Petition

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81-287

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AIR CANADA,

Petitioner,

—v.—

NATIONAL MEDIATION BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ("IBT"); and LOCAL 732, IBT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. What is the standard of review of a certification of a labor representative issued by the National Mediation Board ("NMB" or "Board") when it is challenged by the air carrier, to which it is addressed, because the findings on which it is based were made in violation of the Railway Labor Act ("RLA")?

2. Whether the Board may direct an election and certify a representative among alleged passenger service and fleet service employees of a carrier (a) without conducting any factual investigation to determine whether such employees constitute, on that carrier, a single craft or class, and (b) without any regard for its own prior determinations that existence of such a combined fleet and passenger service craft or class, or of separate fleet service and passenger service crafts or classes, can only be determined after examining the functions, duties and relationships of the employees in question on the particular carrier?

3. Whether the Board may treat as "employees" under the RLA for purposes of craft or class determination, representation election, and certification, persons who had been discharged, because their work was subcontracted, two weeks before the representation application was filed, solely because they filed an action in United States District Court alleging that they had been discharged for their activities in support of a union, an allegation which remains unsupported and undetermined?

4. Whether the Board may exclude from an election approximately 10% of the employees in the group in which it conducted the election, by arbitrarily limiting eligibility to a date more than a year before the election, although the RLA gives the right to determine a representative to the "majority of any craft or class of employees" (RLA, Section 2, Fourth; 45 U.S.C. § 152, Fourth)?

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NATIONAL MEDIATION BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ("IBT"); and LOCAL 732, IBT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Air Canada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 9, 1981.

OPINIONS BELOW

The unreported statement of the court of appeals is set forth in Appendix A. The opinion of the district court of November 14, 1980 dismissing the supplemental complaint, unofficially reported at 107 LRRM 2028, is set forth in Appendix B. The opinion of the district court of August 22, 1979 denying petitioner's application for a temporary restraining order and preliminary injunction, reported at 478 F. Supp. 615, is set forth in Appendix C.

JURISDICTION

The judgment of the court of appeals affirming the judgment of the district court dismissing petitioner's complaint was dated and entered on April 9, 1981. This petition is timely in accordance with this Court's order of June 29, 1981, extending the time for filing to and including August 7, 1981. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Set forth in Appendix D are the pertinent provisions of the Railway Labor Act, 45 U.S.C. §§ 151, Fifth; 152, Fourth, Ninth; 181 and 182, and of the NMB regulations, 29 C.F.R. § 1206.6.

STATEMENT OF THE CASE

Air Canada's supplemental complaint, dismissed by the courts below, seeks to set aside the NMB's certification of the respondent IBT as the representative of a craft or class of fleet and passenger service employees of Air Canada. The complaint alleges (1) that the NMB had conducted no investigation to determine the existence of a fleet and passenger service em-

ployees craft or class on Air Canada; and (2) the NMB permitted some 74 former employees to vote in the election it nevertheless ordered among "fleet service and passenger service employees" of Air Canada, and excluded some 49 current employees from voting because they were hired within the thirteen months before the election. On the premise that the Board had conducted an investigation, the court of appeals held that the district court "lacked power to interfere with the Board's discretionary determinations" of craft or class, but it said nothing about its power to review a certification. The court, moreover, held that Air Canada's other claims of NMB statutory violations in making the findings on which the certification rested were properly dismissed under F.R.Civ.P. 12(b)(6) as failing to state a claim upon which relief could be granted, without deciding whether it had jurisdiction to review them.

Those determinations were made on the following facts:* On March 29, 1978, Air Canada subcontracted its ramp service work and terminated the employment of all of its fleet service employees at New York, Chicago, and Cleveland—the only three stations in the United States where Air Canada used its own employees to perform ramp service work. More than two weeks later, on April 13, 1978, the IBT filed with the NMB an application seeking to represent the employees of Air Canada in the craft or class of clerical, office, fleet and passenger service employees. By June, 1979, however, the IBT was seeking to represent only an alleged craft or class of fleet service and passenger service employees.

Without conducting any investigation to determine whether those alleged Air Canada employees had such a community of interest that they constituted a single craft or class, the Board

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* The statement of facts is based upon the allegations of the supplemental complaint, which were accepted as true for purposes of respondents' motion to dismiss, and portions of the administrative record which were before the district court. Portions of the record contained in the Appendix filed in the court of appeals are referred to as "A"-, followed by a page number.

simply directed a Mediator to examine the sufficiency of the union's showing of interest in the purported craft or class, and announced, on August 3, 1979, "Board finds dispute exists among fleet and passenger service employees, employees of Air Canada and authorizes mail ballot election using cut-off date of July 9, 1978." (A-176). The Board made that "finding" although it knew that as of July 9, 1978, Air Canada had no fleet service employees, and indeed had not had any since March 29, 1978. The Board did not purport to find any facts, as of any date, to support any conclusion that the work relationship between any Air Canada fleet service employees and passenger service employees was such that they constituted a single craft or class.

On August 21, 1979, Air Canada began this action, seeking to enjoin the representation election which the Board had ordered to begin on August 24; the district court denied the request for injunctive relief by its decision and order of August 22, 1979 (Appendix C). On October 2, following completion of the election, the NMB certified the IBT as representative of the "craft or class of Fleet and Passenger Service Employees, employees of Air Canada". Air Canada served a supplemental complaint on November 2, 1979, asking that the court declare the certification issued by the NMB null and void and, alternatively, enjoin the enforcement of the certification until final decision in the pending action entitled *Derespinis et al. v. Air Canada*, 79 Civ. 0489 (S.D.N.Y.), determines whether the former fleet service employees whom the Board permitted to vote in the representation election were discharged for union activity.

When it ordered the supplemental complaint dismissed by its decision of November 14, 1980, the district court held that it had "jurisdiction to review some NMB decisions. . . . to determine whether the actions of the NMB under the RLA meet statutory requirements" (App. B, p. 8a). It held, however, that "[i]n light of prior NMB determinations, actual bargaining experience and the expression of the parties' views, we cannot say that the NMB violated the statutory mandate to

investigate disputes by failing to engage in 'necessary' investigations" (App. B., p. 11a)

The district court further held that the "statutory basis of NMB authority permits, indeed requires, judicial oversight" (App. B, p. 12a) of Air Canada's claim that the Board improperly allowed the former ramp service employees to vote. It upheld the Board's action, however, on the basis of an NMB rule making eligible to vote "[d]ismissed employees whose requests for reinstatement on account [of] wrongful dismissal are pending before proper authorities" (*id.*), and stated that "the ramp service employees may be considered 'employees' for voting purposes, at least until *DeRespinas* [sic] is decided." (App. B, p. 13a) It said nothing in that decision about the Board's exclusion from the election of 49 current employees, as the result of the Board's choice of July 9, 1978 as the eligibility cut-off date, more than 13 months before the date of the election.

The court of appeals affirmed the district court's dismissal of the supplemental complaint on April 9, 1981, with a statement which it disclaimed as a formal opinion. It acknowledged that "[t]he Board is required 'to investigate' the propriety of any proposed craft or class" (App. A, p. 3a) but held that "the form and extent of its investigation is committed to the Board's discretion" (*id.*).

Despite the absence of anything to show that the Board had investigated the duties of fleet service and passenger service employees on Air Canada, the court of appeals held that "the district court correctly concluded that it lacked power to interfere with the Board's discretionary determinations" (App. A, p. 3a). The court purported to find the necessary basis for the Board's craft or class selection principally in the Board's "extensive experience with each of the categories of employees [on other airlines] as well as with the overall, traditional class or craft" (*id.*). As to the Board's definition of employee, both inclusionary and exclusionary, the court held there was no violation of the statute.

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

This Case Presents the Important Question Under the RLA of the Reviewability of Certifications, a Question Reserved by This Court and Not Yet Decided.

The complaint herein squarely raises the question whether a certification of a labor representative by the National Mediation Board is enforceable when the National Mediation Board violated the Railway Labor Act in making the basic findings on which the certification rests. Almost forty years ago, this Court held in *Switchmen's Union of North America v. National Mediation Board*, 320 U.S 297 (1943), that direct review of a certification was not available to a rival union, but said:

> "What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under § 2, Ninth raises questions not now before us. See *Virginian Ry. Co. v. System Federation No.* [300 U.S. 515,] pages 559-562, 57 S.Ct. pages 605, 606, 81 L.Ed. 789." 320 U.S. at 307.

In the *Virginian Ry.* case, the Court, far from stating that the courts must impotently accept NMB certifications, said that a Board certification after an election had to be based on findings as to the number of eligible voters, the number participating, and the choice of the majority of those who participate. If any of those basic findings were missing, the Court had authority to inquire into the validity of the certification. The Court, moreover, specifically declined to determine whether the certification, if made as to those facts, would be conclusive:

> "The National Mediation Board makes no order. The command which the decree of the court enforces is that of

> the statute, not of the Board. Its certificate that the Federation is the authorized representative of the employees is the ultimate finding of fact prerequisite to enforcement by the courts of the command of the statute. There is no contention that this finding is conclusive in the absence of a finding of the basic facts on which it rests—that is to say, the number of eligible voters, the number participating in the election and the choice of the majority of those who participate. *Whether the certification, if made as to those facts, is conclusive, it is unnecessary now to determine.* But we think it plain that if the Board omits to certify any of them, the omitted fact is open to inquiry by the court asked to enforce the command of the statute." 300 U.S. at 562 emphasis added.

This case, then, presents precisely the question reserved in the *Switchmen's Union* and *Virginian Railway* cases;* it should not matter that the action is that of a carrier seeking a declaration of unenforceability, rather than one in which enforcement is sought against the carrier. In the almost four decades since the *Switchmen's* decision, this Court has not had occasion to decide the question it left open; it should be decided in this case rather than to permit the decision below to stand as an endorsement of the power of the Board to impose union representation on a carrier without any opportunity for the carrier to enforce compliance with the RLA except to verify that the Board conducted an "investigation", *Railway Clerks*, 380 U.S. at 661.**

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* In *Brotherhood of Railway & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, ("*Railway Clerks*"), 380 U.S. 650 (1965), as well, this Court was careful to point out that the *Virginian Ry.* case—the "Keystone case dealing with the Railway Labor Act"—had found it unnecessary to decide whether the Board's certification of the results of an election would be conclusive. 380 U.S. at 661 n.2.

** Thus, for example, the Court of Appeals for the Eighth Circuit has said, "It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a

The complaint and the supporting papers in the record below showed that the Board determined the number of eligible voters, *i.e.*, by directing an election in the purported craft or class of fleet and passenger service employees, without any investigation into the relationship between fleet service and passenger service employees, allegedly in the employ of Air Canada, which might or might not have resulted in a determination that together they constituted a single craft or class. The decision of the court of appeals that the Board's possession of other information nevertheless constituted compliance with its statutory duty to investigate is a gross distortion of this Court's *Railway Clerks* decision. (See pp. 9-15, below).

In the further process of determining the number of eligible voters, moreover, the Board included 74 former employees and excluded 49 current employees. The inclusion was based on an unsupported and undetermined claim that the former employees were discharged for anti-union reasons; the exclusion was based on an arbitrary determination by the Board that only those employees hired more than 13 months before the date of the election would be allowed to vote. These determinations violated the statutory definition of employee, just as the failure to gather facts as to the work and relationships of alleged Air Canada fleet service and passenger service employees violated the Board's statutory duty to investigate the craft or class issue. If the certification which the Board issued is nevertheless

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carrier without a hearing of any sort. The protections afforded a noncarrier employer by the National Labor Relations Act are much to be preferred. But the responsibility to make that decision rests with Congress and not this court." *Sedalia-Marshall-Boonville Stage Line, Inc. v. National Mediation Board*, 574 F.2d 394, 399-400, n.5 (8th Cir.), *cert. denied*, 439 U.S. 881 (1978). It is precisely because a carrier is not a party to the representation proceedings, *Railway Clerks*, at 666, that this Court should determine whether the carrier may challenge the certification resulting from those proceedings when enforcement is sought against the carrier. *See United States v. Feaster*, 410 F.2d 1354, 1361-63 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969); *Delpro Co. v. National Mediation Board*, 509 F. Supp. 468, 473-75 (D. Del. 1981).

conclusive, such statutory violations cannot be corrected. This Court, therefore, should answer the question it left unanswered in *Switchmen's Union* by holding that Board certifications are not conclusive, but are subject to challenge under a standard less restrictive than the very limited standard which the courts below acknowledged that this Court had recognized in precertification cases.

II.

This Case Presents the Important Question under the RLA of What is Sufficient to Satisfy the Board's Duty to Investigate, a Question Which the Court below Decided Contrary to This Court's Decision in the *Railway Clerks* Case.

The decision below, while purporting to rely on the *Railway Clerks* decision, drastically departs from that decision in holding that the Board satisfied its statutory duty to investigate the composition of the craft or class or crafts or classes entitled to vote on the question of union representation. The question presented to the Board when the IBT sought to represent alleged fleet service and passenger service employees in a single unit was whether such employees had such a working relationship on Air Canada that they should vote as a unit or whether, because they lacked community of interest, they should vote in separate units.

In *Railway Clerks*, this Court said expressly that "the Board's duty to investigate is a duty to make such investigation as the nature of the case requires". 380 U.S. at 662. In that case, the Board had determined to hold an election in the long-established craft or class of office, clerical, fleet and passenger service employees (the so-called "R-1706" craft or class); United Airlines argued that the Board had not conducted a sufficient investigation to make such a craft or class determination. This Court, however, said that the NMB had first found that craft or class to exist in 1947, after a comprehensive industry-wide investigation, and had continued to

recognize that craft or class, and to observe the success of that grouping in collective bargaining for 15 years.

Rejecting United's challenge to the Board's decision to conduct an election in the R-1706 craft or class, without a hearing on United's claim that the craft or class should be divided on United, the Court said:

> ". . . where the unions have agreed and the unit they have agreed upon has been one well-established in industry bargaining circles, it [the Board] has usually held elections without full scale hearings, not simply because the unions agree but because the unit upon which they agree is one that is well-recognized under prior determinations of the Board and has proven satisfactory in actual experience. That is what it did here." 380 U.S. at 665.

The Court specifically contrasted the Board's policy in cases involving untested crafts or classes:

> "Where units untested by actual collective bargaining have been proposed by the unions involved the Board has consistently held hearings to determine the propriety of holding elections in those crafts or classes." 380 U.S. at 665.

The craft or class proposed by the union here was just such an untested unit. It is only one of numerous possible combinations of the employee classifications which had made up the R-1706 unit, which the Board in 1978 was reexamining, case by case, when requests were made to represent segments of that grouping. *See, e.g., United Airlines, Inc.*, 6 NMB 180 (1977), *American Airlines, Inc.*, 6 NMB 661 (1978). That reexamination particularly required a factual investigation as to the relationship of the involved employees whenever a request was made to represent a unit of fleet service and passenger service employees, as the Board itself unequivocally acknowledged. A formal hearing is not required by the statute, *Railway Clerks*, 380 U.S. at 666, but the determination of particular facts on the particular carrier involved was indispensable.

Thus, in 1970, the Board initiated a re-examination of the contemporary appropriateness of the R-1706 craft or class. In 1972, after conducting a two-year long investigation with the participation of all the major air carriers and unions, the Board concluded that the clerical, office, fleet and passenger service employees craft or class remained the appropriate and established grouping for the classifications included in that craft or class. *Memorandum Re Airline Industry Hearings*, 5 NMB 2, 5 (August 25, 1972).

Five years later, in 1977, on an application to represent only passenger service employees of United Airlines, the Board held hearings, involving United only, in which it investigated the duties and functions of United's passenger service employees, and other classifications which until then had been included in the established clerical office, fleet and passenger service employees craft or class for 30 years. As a result of that investigation, the Board determined that there was a separate passenger service employees craft or class on United. *United Airlines, Inc.*, 6 NMB 180 (March 23, 1977).

The *United* decision marked a 180-degree change in the Board's approach to craft or class determination—essentially discarding the single industry-wide craft or class which had been upheld in *Railway Clerks*. In *United*, however, the Board said that its decision was not a precedent for other air carriers and in each case where future applications were filed for representation of groups other than the established R-1706 group, an investigation would have to be held and determination made on the basis of the evidence on the particular carrier. 6 NMB at 186.

On March 21, 1978, less than a month before the IBT filed its representation application for Air Canada employees on April 13, 1978, the Board reiterated, in the strongest possible language, that any question of the division of the R-1706 craft or class into smaller crafts or classes had to be determined on a carrier by carrier basis:

> "Given the diversification among trunk carriers, regional carriers, third-level carriers, and some carriers specializing in freight service, the Board recognized that these craft or class questions must be dealt with on a carrier by carrier basis. Is also recognized that rigid and inflexible rules would not accommodate the growth and change within the airline industry. *Each case had to be determined on its particular facts* and stable labor relations would not be promoted by forcing airline bargaining into a doctrinal straitjacket." (*Allegheny Airlines, Inc.*, 6 NMB 416, 424 (March 21, 1978); emphasis added)

Accord: *Royal Hawaiian Air Service*, 6 NMB 516, 520 (May 24, 1978); *Lanica Airlines, Inc.*, 6 NMB 556, 559-60 (July 11, 1978); *Eastern Air Lines, Inc.*, 6 NMB 561, 565 (July 13, 1978).

Moreover, with respect to the very question of the possible existence of a combined fleet and passenger service employees craft or class, the Board said in *Continental Airlines*, R-4448 (November 11, 1977), that that question, above all others, had to be the subject of a factual investigation in every case in which it was alleged that there might be a combined fleet service and passenger service craft or class:

> "The Board recognizes there is considerable diversity on the various airlines in which 'Fleet Service' employees are grouped for collective bargaining purposes. On at least one airline where the question concerning the proper allocation of 'Fleet Service' employees arose, the Board found that there was a close functional integration of all employees in fleet and passenger service classifications; *Executive Airlines, Inc.*, Case No. R-4344, decided August 14, 1973. On another, *United Airlines*, Case No. R-4550, the Board has found that such functional integration does not exist.
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> The Board's procedures cannot be so rigid and inflexible that it cannot meet growth and change within the

> airline industry, *on a carrier by carrier basis, particularly with respect to groups of employees where there may or may not be a close functional integration such as is possible in the fleet and passenger service classifications. Each case must be determined on the particular facts there present*. Labor relations stability is not promoted by forcing airline bargaining into a doctrinal straitjacket." R-4448, at 12; emphasis added.

Here, however, it is undisputed that the Board failed to conduct any investigation to determine the relationship, if any, between alleged fleet service and passenger service employees on Air Canada. In justifying that failure, the court of appeals said that the Board "had, and relied upon, extensive experience with each of the categories of employees as well as with the overall, traditional class or craft" (App. A, p. 3a). Experience with the "overall, traditional class or craft", *i.e.*, the R-1706 grouping, could not conceivably provide any answer to the question of whether there was a fleet and passenger service employees group on Air Canada. And experience with "each of the categories of employees" on other carriers, simply taught the Board that "there is considerable diversity on the various airlines in which 'Fleet Service' employees are grouped for collective bargaining purposes" and that "Each case must be determined on the particular facts there present." *Continental Airlines*, R-4448, quoted *supra*, pp. 12-13. Such experience could not possibly lead to an *a priori* determination that the particular facts on Air Canada showed the existence of a fleet service and passenger service employees unit.*

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* The Board's own view of its experience is sharply at variance with that of the court. Just two weeks ago, the Board said of the passenger service employees involved in the *United* case that their "primary responsibilities are to the flying public" and they "have a community of interest which transcends their physical work location." "Ramp personnel," however, "having no direct interaction with the public, *do not share that community of interest*." *Air Florida*, 8 NMB No. 181 (July 22, 1981), pp. 573-74; emphasis added. Unfortunately, the court of appeals did not have the benefit of that Board statement when it speculated about Board "experience" of a community of interest

In precisely the situation of an untested unit which this Court, in *Railway Clerks*, said required an investigation, the court of appeals says that the *Railway Clerks* requirement is satisfied even though, concededly, there was no investigation of the facts on Air Canada. The court considered that an adequate substitute for such investigation was the irrelevant experience of the Board with respect to the R-1706 craft or class to which the Board was not adhering in this case, and its knowledge of jobs similarly labeled on other carriers, which the Board itself proclaimed made it aware only that such jobs differed in content and relationship on each carrier.

There is simply no way to explain the Board's determination that fleet service and passenger service employees on Air Canada constitute a craft or class on the basis of any factual investigation, or prior Board determinations. The court of appeals does not do so, but seeks to excuse the failure to investigate by saying: "the only party complaining of the Board's determinations was the employer" (App. A, p. 3a) and "the only factual basis upon which Air Canada ever claimed before the Board that a class or craft combining fleet and passenger service employees was improper was the argument that Air Canada had no fleet service employees" (*id.*).*

The court of appeals thus sought to place the burden of the Board's improper performance of its investigation on Air Canada—which is *not* a party to the representation proceeding, *Railway Clerks*, 380 U.S. at 666, and, according to the Board, is not entitled to be heard. *See, e.g., Air Florida*, 8 NMB No. 181 (July 22, 1981), p. 574. It is the statute, however, which imposes the duty on the Board to investigate whether fleet service and passenger service employees on Air Canada constitute a craft or class.

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between ramp employees and passenger service employees, the existence of which the Board, in the fullness of its experience, categorically denies.

* The absence of any fleet service employees would seem to have been the first, and insuperable, obstacle to combining fleet service and

The Board's own decisions, in the *Continental* case, and other cases, repeatedly emphasize the need for such factual investigation on each carrier. Concededly the Board conducted no such investigation here. The conclusion of the court of appeals that it "lacked power to interfere with the Board's discretionary determinations" (App. A, p. 3a), subverts the *Railway Clerks* case, equating the thorough investigation and 15 years of practical experience which supported the consistent industry-wide craft or class determination upheld in *Railway Clerks* with an arbitrary failure to investigate the very facts which the Board itself says are essential to a case by case craft or class determination. This Court should make it clear, on review of the judgment below, that the Board's duty to investigate is not satisfied by reliance on irrelevant "experience."

III.

This Case Presents the Important Question of Who are Employees for Representation Elections under the RLA.

A. The former ramp servicemen were not employees of Air Canada and should not have been allowed to vote.

Air Canada's complaint alleges that the Board violated the Railway Labor Act by treating as employees for purposes of the representation election, 74 ramp servicemen who were dismissed two weeks before the IBT representation application was filed. The district court held it had jurisdiction over that

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passenger service employees in a single craft or class. The Board's determination to consider such former employees eligible to vote in an election, besides being unlawful (see pp. 15-18 below), could not supply the missing basis for a determination that fleet and passenger service employees were a single craft or class. Moreover, once the Board ruled that it would consider ramp servicemen employees, Air Canada specifically asked for an investigation to examine into the facts of any alleged relationship between those employees and passenger service employees.

claim,* but upheld the Board's action on the basis of a Board rule which says "[d]ismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities . . . are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal." 29 CFR § 1206.6. The 74 individuals had filed an action claiming that they were terminated because of union activities.** The court of appeals affirmed dismissal of the claim of improper NMB treatment of those former employees as employees, without deciding whether the district court properly assumed jurisdiction.

There is no warrant in the statute, however, or in any case decided under the RLA, to construe the plain word "employee", expressly defined as one "in the service of a carrier," (Section 1, Fifth; 45 U.S.C. § 181 Fifth) to include 74 people who are not "in the service of" the carrier. Pertinently, in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), this Court held that retired workers were not "employees" within the meaning of the NLRA. As a matter of law, the Court reversed the Board's determination that retirees are "employees" under the Act, stating that "the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire." *Id.*

In words especially pertinent here, the Court added:

> "No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an 'employee.' " 404 U.S. at 168.

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* The court said: "This is another area where the statutory basis of NMB authority permits, indeed requires, judicial oversight. The RLA, 45 U.S.C. § 152, Ninth, limits participations in elections to employees; employees are defined in 45 U.S.C. § 151, Fifth, as 'person[s] in the service of a carrier' " (App. B, p. 12a). See *International Longshoremen's Association v. North Carolina State Ports Authority*, 370 F. Supp. 33, 39, 40 (E.D.N.C. 1974), *aff'd on opinion below*, 511 F.2d 1007 (4th Cir. 1975), holding that NMB determination of "employee" status, under the RLA, is subject to judicial review.

** That action, *Derespinis et al. v. Air Canada*, 79 Civ. 0489 (LFM), remains pending in the Southern District of New York.

That holding, that the question of "employee" status may be reviewed under the NLRA as a matter of law,* and the limitation of that term to its plain meaning, should have equal applicability under the RLA. And a mere claim of illegal discharge cannot give a dismissed employee that "expectation of further employment" sufficient for him to be considered as an employee.

To permit the Board, as the court below did, to interpret the statute so as to make fully effective the vote of even a single former employee, on his mere claim of improper dismissal, let alone the votes of a large group of former employees, constituting almost 15% of the electorate, is to make it possible to force upon employees who, under the statute, have the right to choose by majority vote among themselves whether or not they wish to be represented, a representative chosen by individuals who are not employees. The rule applied by the NMB to this case would mean that any time a carrier lawfully subcontracted a part of its operations, and terminated some or even all of its employees, those terminated employees could nevertheless file a *subsequent* representation application, choose a representative, and compel the carrier to bargain, merely by filing a complaint in court alleging that the termination was unlawful, even if the termination is ultimately found lawful.

By contrast, the practice followed by the NLRB in cases involving dismissals allegedly in violation of the unfair labor practice provisons of the NLRA, or other alleged unlawful terminations under challenge in court, is to defer a decision on the eligibility of the former employees to vote until after a court has resolved the question of whether or not they were properly terminated. If ballots cast in an NLRB election by a dismissed employee who is contesting the validity of his dismissal may be determinative of the election results, as they

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* *See also, Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 906 (D.C. Cir. 1979) (" 'the question whether or not a person is an employee is always a question of law.' It is a legal conclusion to be drawn from the facts—not a question of policy."; *Choc-ola Bottlers, Inc. v. NLRB*, 478 F.2d 461 (7th Cir. 1973).

were here, and those ballots are challenged, the NLRB will resolve the challenge only when the unfair labor practice or court proceedings are concluded. *See McClure Associates, Inc.*, 223 NLRB 580 (1976), *enf'd*, 556 F.2d 725 (4th Cir. 1977); *Advance Industrial Security, Inc.*, 217 NLRB 17 (1975); *Grand Lodge International Association of Machinists*, 159 NLRB 137 (1966).

The district court viewed the rule, and its application in this case, as consistent with the statutory purpose that the representation desires of employees be ascertained without carrier interference. (App. B, p. 12a). To the contrary, the automatic application of the rule,* by presuming that the carrier has acted unlawfully until proved otherwise, insures that, if no illegal motive is present, the carrier's true employees' true representation desires may be rendered unavailing, and the carrier compelled to bargain with a union which does not represent a majority of its employees. Unless this Court, on review, holds that "employee" as defined in the Railway Labor Act, does not include former employees who merely claim they were improperly discharged, the Board will be free to continue to issue certifications whose validity depends on the erroneous finding that a majority of the employees desired representation.

B. The NMB unlawfully excluded 49 passenger service employees by arbitrary selection of a cut-off date more than a year before the election.

In their final decisions, the courts below failed to address petitioner's claim that the Board unlawfully excluded 49 passenger service employees from voting by application of an

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* By contrast with its explicit refusal in this case to investigate whether the fleet service employees were improperly discharged, the Board has most recently conducted an investigation into the very question of whether employees were improperly terminated, before permitting them to vote under the same rule relied on in this case to justify voting without any such investigation. *American Inter-Island, Inc.*, 8 NMB No. 121 (May 7, 1981).

eligibility cut-off date more than 13 months prior to the election.* While some cut-off date for an election is surely required to permit orderly administration of the election process, the Board's authority to establish a cut-off date for that purpose, surely, as a matter of statutory construction, cannot be extended to deprive employees in the designated voting group of their voting rights by use of a cut-off date which has no reasonable administrative or statutory purpose.

The Railway Labor Act explicitly provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class" (Section 2, Fourth; 45 U.S.C. § 152, Fourth). The term "employee" is defined as "includ[ing] every person in the service of a carrier. . . ." (Section 1, Fifth; 45 U.S.C. § 151 Fifth). That definition plainly means that the RLA requires every employee in the craft or class to be included in the process of representative selection.

The Board's statutory authority to "designate who may participate in the election" (RLA, Section 2, Ninth; 45 U.S.C. § 152, Ninth) can not reasonably be construed to permit the Board to designate only persons who were employed as of a date more than a year before the election. Although, in practice, determinations are not made within the 30-day period after an application is filed, as provided in the statute, (RLA, Section 2, Ninth), the legislative directive that the Board is to investigate a dispute and certify the name of the designated and authorized representative "within thirty days after the receipt

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* The only discussion of this claim by the lower courts is in the district court's decision denying petitioner's application for a preliminary injunction. (App. C, pp. 17a-19a). The district court asserted that "there is no clear statutory provision indicating that the Board may not under some circumstances impose a cut-off date which happens to be a year prior to the actual conduct of the election." (App. C, p. 18a). The positive command of the statute, however, that a majority of the employees in the craft or class shall determine their representative should make unnecessary explicit negation of exclusion of some of those employees, absent some rational reason for exclusion.

of the invocation of its services" makes clear that Congress intended that the choice of representative would be made by current employees of a carrier at the time of the election.

In *Erie Railroad Co.*, 3 NMB 187 (1955), the Board indeed explained that an election cut-off date was required for an "orderly balloting procedure," to afford adequate prior "opportunity to validate the right of the individual to participate in the election" (*id.* at 191). The very practice in federal, state and local elections on which the Board relied as supporting the cut-off date policy announced in its *Erie* decision* (*id.*) demonstrates the illegality of the cut-off date used in this case; a similar durational requirement of 13 months would not be lawful if applied in any federal, state or local election. 42 U.S.C. § 1973 aa-1 (d) (no residency requirement later than 30 days prior to presidential election); *Dunn v. Blumstein*, 405 U.S. 330, 352 (1972); *Marston v. Lewis*, 410 U.S. 679 (1973); *Burns v. Fortson*, 410 U.S. 686 (1973).

Review by this Court, therefore, is necessary to establish that, absent some legitimate purpose for a cut-off date as early as that used in this case—which the NMB has never expressed—the Board can no more disenfranchise employees from the opportunity to vote in the selection of a representative under the RLA than can governmental entities disenfranchise citizens from voting in political elections.

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* The Board did not apply the policy announced in the *Erie* decision in this case. One of petitioner's allegations was that the cut-off date established in this case departed from the Board's practices in other cases.

Conclusion

The Court should grant the petition, to provide opportunity for full consideration of the question of the extent to which Board certifications issued under the RLA may be reviewed when challenged on colorable grounds by the carrier against whom they are sought to be enforced. Otherwise, the Board will be encouraged to continue to believe that no matter how egregiously wrong its findings are, or indefensibly arbitrary—as they were here—no judicial correction is available; and the lower federal courts, while continuing to deplore the actions of the Board, will believe themselves powerless to enforce any remedy.

Respectfully submitted,

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Attorneys for Petitioner
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Dated: New York, New York
August 7, 1981

APPENDICES

Appendix A

Judgment and Statement of
Court of Appeals
Dated April 9, 1981

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of April, one thousand nine hundred and eighty-one.

Present:

HON. WILLIAM H. TIMBERS,
HON. JON O. NEWMAN,
Circuit Judges,

HON. ABRAHAM D. SOFAER,
District Judge,
Sitting by Designation.

79-6162, 80-6252

AIR CANADA,

Plaintiff-Appellant,

—v.—

NATIONAL MEDIATION BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ("IBT"); and LOCAL 732, IBT,

Defendants-Appellees.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed* substantially for the reasons set forth in Judge Stewart's opinions dates August 22, 1979 and November 14, 1980, supplemented by the following brief statement of our own.

This appeal concerns the selection of a labor representative for a group of Air Canada employees. The general issue presented is whether the Board properly carried out its duties under the Railway Labor Act (RLA), 45 U.S.C. §§ 151 *et seq.* (1976) in certifying the union as the labor representative for a class or craft of appellant's employees.

On April 13, 1978 appellee unions filed with the National Mediation Board (the "Board") an application under § 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth (1976), requesting the Board to investigate a representation dispute among the existing, unitary class or craft of Air Canada's clerical, office, fleet and passenger service employees. By letter dated May 22, 1978, the union amended the application to cover two distinct crafts or classes: (1) clerical and office employees; and (2) fleet and passenger service employees.

Air Canada now claims that the jurisdiction of the Board was not properly invoked by the amended application; that, assuming the Board's jurisdiction was properly invoked, the Board abdicated its statutory duty to investigate the representation dispute; and that the Board committed various errors in the conduct of the election.

The district court held that it had jurisdiction to determine whether the Board's actions under the RLA met statutory standards. The court dismissed the action under Fed. R. Civ. P. 12(b)(6), however, on the ground that many of the Board's actions complained of fell within the Board's unreviewable administrative discretion and that other of the Board's acts, as alleged in the complaint, even though reviewable, did not state a claim upon which relief could be granted.

The Board is required "to investigate" the propriety of any proposed craft or class, but the form and extent of its investigation is committed to the Board's discretion. In this case, the Board had under its consideration a petition to certify both classes; it held a hearing for several days concerning the clerical and office employees, at which evidence was considered relating to possible overlap between this group and fleet or passenger service employees; it collected information concerning employee sentiment, and the only party complaining of the Board's determinations was the employer, *see Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Noncontract Employees,* 380 U.S. 650, 666-67 (1965); it had, and relied upon, extensive experience with each of the categories of employees as well as with the overall, traditional class or craft; and the only factual basis upon which Air Canada ever claimed before the Board that a class or craft combining fleet and passenger service employees was improper was the argument that Air Canada had no fleet service employees. Under these circumstances, the district court correctly concluded that it lacked power to interfere with the Board's discretionary determinations. In light of the district court's rejection of Air Canada's other objections, which which we agree, we need not decide whether the court erred in assuming jurisdiction over the other claims. *See, e.g., Sedalia-Marshall-Boonville Stage Line, Inc. v. National Mediation Board,* 574 F.2d 394 (8th Cir. 1978), *cert. denied,* 439 U.S. 881 (1979); *Local 732, International Brotherhood of Teamsters v. National Mediation Board,* 438 F. Supp. 1357 (S.D.N.Y. 1977); *Philippine Airline, Inc. v. National Mediation Board,* 430 F. Supp. 426 (N.D. Cal. 1977).

Finally, Air Canada complains that, as a result of the Board's determination, it may be forced to bargain with the union concerning the terms and conditions of employment of fleet service employees even if it is ultimately vindicated in its claim that it could lawfully have all its fleet service functions performed under contract, an issue presently under consideration in *Derespinas v. Air Canada,* 79 Civ. 0489 (LFM) (S.D.N.Y.). This matter is not properly before us, and we make no comment on it.

/s/ William H. Timbers
WILLIAM H. TIMBERS
UNITED STATES CIRCUIT JUDGE

/s/ Jon O. Newman
JON O. NEWMAN
UNITED STATES CIRCUIT JUDGE

/s/ Abraham D. Sofaer
ABRAHAM D. SOFAER
UNITED STATES DISTRICT JUDGE
Sitting by Designation

United States Court of Appeals
Filed
April 9, 1981
A. Daniel Fusaro, Clerk
Second Circuit

Appendix B

United States District Court Decision
Dated November 14, 1980

United States District Court

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 4401 (CES)

AIR CANADA,

Plaintiff,

—against—

NATIONAL MEDIATION BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ("IBT"); and LOCAL 732, IBT,

Defendants.

STEWART, *District Judge*:

Plaintiff brought this action under 28 U.S.C. § 1337 (1976), claiming that defendant National Mediation Board ("NMB") violated the Railway Labor Act, 45 U.S.C. §§ 151-58 (1976) ("RLA"), and various implementing regulations in certifying defendant International Brotherhood of Teamsters ("IBT") as the labor representative for a class or craft of fleet and passenger service employees.[1] Plaintiff seeks to annul the NMB

1 The RLA establishes means of selecting collective bargaining representatives in the airline industry. The majority of any "craft or class of employees" may select a representative for the employee unit. *See* 45 U.S.C. § 152, Fourth (1976). Determining which employees are to be included in any class or craft thus assumes great importance for unions seeking to represent employees, as well as those employers or employees that do not desire representation. A "craft" is defined as a category of people engaged collectively in a trade; a "class" is a group of people

certification of IBT and to stay plaintiff's responsibility to negotiate with IBT until *DeRespinas v. Air Canada,* 79 Civ. 0489 (S.D.N.Y.), is resolved. It is plaintiff's contention that the NMB's jurisdiction was improperly invoked, that the NMB investigation was inadequate even if its jurisdiction was valid and that the election was improperly conducted. Defendants move to dismiss plaintiff's supplemental complaint under F.R.Civ.P. 12(b)(1) and 12(b)(6). This court previously considered and rejected most of plaintiff's contentions in denying temporary and preliminary injunctive relief, *see Air Canada v. NMB,* 79 Civ. 4401 (S.D.N.Y. August 22, 1979), Memorandum Decision, p.2.

A chronology of the action is established by the pleadings. On March 29, 1978, plaintiff terminated the employment of its ramp service employees. The validity of plaintiff's action regarding the ramp servicemen is at issue in *DeRespinas v. Air Canada,* now pending in the United States District Court for the Southern District of New York. On April 13, 1978, IBT filed an application with the NMB to represent the plaintiff's existing, unitary class or craft of clerical, office, fleet and passenger service employees.[2] The IBT subsequently sought to amend their application to divide the existing, unitary class into two classes for representation purposes: office and clerical

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having common characteristics or the same status. *See Switchmen's Union v. NMB,* 135 F.2d 785, 793 (D.C. Cir. 1943). Historically, factors used by the NMB to delimit a class or craft include voluntary groupings developed by employees on a carrier of a given type, duties and responsibilities of employees, the community of interest among employees and previous decisions of the NMB. *See Railway & Steamship Clerks v. Nashville, Chattanooga & St. Louis Ry. Co.,* 94 F.2d 97, 100 (6th Cir. 1937).

2 The class or craft of clerical, office, fleet and passenger service employees was, historically, a residual bargaining group that did not result from a determination of common interests or tasks. It was merely a combination of the employees for collective bargaining purposes that remained after all the other known crafts or classes were determined. These employees did not, at the time, fit in any other class or craft, nor were they distinguishable from each other.

employees as distinct from fleet and passenger service employees.

The NMB docketed the case regarding the office-clerical unit and conducted an investigation of that distinct unit that included eight days of hearings. Ultimately, the NMB concluded that a separate class or craft of office-clerical employees existed, but dismissed the representation request for failure to meet the so-called showing of interest requirement of the implementing regulations; fewer than 35% of the employees in the unit desired representation by IBT.

On May 24, 1979, the NMB docketed the fleet and passenger service employees case. A mediator was appointed to investigate the dispute over representation by the IBT. The Mediator ruled on July 26, 1979 that a proper application had been filed by IBT. Appeal was permissible prior to August 13, 1979. However, on August 3, 1979, the NMB determined that a dispute existed as to representation of fleet and passenger service employees and authorized an election. Plaintiff timely appealed the mediator's decision to the NMB but was ordered to prepare for an election before the NMB reached a decision on the appeal. By order to show cause, plaintiff sought temporary and preliminary injunctive relief in this court to stay the election in the fleet and passenger service unit. We denied plaintiff's application by Memorandum Decision dated August 22, 1979. NMB denied plaintiff's appeal of the mediator's ruling on August 22, 1979. Then plaintiff contested the jurisdiction of the NMB and the determination of the voting eligibility of the terminated ramp servicemen by letter to the NMB. The votes were tabulated over plaintiff's objection and the IBT was certified as representative of the plaintiff's class or craft of fleet and passenger service employees.

The first issue and the threshold question in determining the validity of the NMB certification procedure, is whether the NMB's jurisdiction was effectively invoked. Specifically, plaintiff contends that: (a) no proper application for NMB's services was filed; (b) no proper authorization cards were filed; (c) no proper showing of interest by 35% of the employees in the unit was made; and (d) no proper determination of craft or class was made.

The scope of judicial review of NMB decisions is limited. *See Brotherhood of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Employees,* 380 U.S. 650, 661 (1965) ("Railway Clerks"); *Leedom v. Kyne,* 358 U.S. 184, 188 (1958); *Local 732, Int'l Bhd. Teamsters v. Nat'l Mediation Bd.,* 438 F. Supp. 1357, 1363 (S.D.N.Y. 1977); *Aircraft Mechanics Ass'n v. United Airlines,* 406 F. Supp. 492, 500 (N.D. Cal. 1976). Contrary to defendant's contention, however, we clearly have jurisdiction to review some NMB decisions. *See Int'l In-Flight Catering v. Nat'l Mediation Bd.,* 555 F.2d 712, 717 (9th Cir. 1977). Our obligation is to determine whether the actions of the NMB under the RLA meet statutory requirements. *See Railway Clerks,* 380 U.S. at 661; *Int'l In-Flight Catering v. Nat'l Mediation Bd.,* 555 F.2d at 717.

Under the RLA, 45 U.S.C. § 152, Ninth, the NMB is charged with a duty to investigate and certify authorized representatives "if any dispute shall arise" regarding labor representation. The statute does not, however, prescribe the means by which the NMB shall determine whether a dispute requires its intervention. Rather, internal regulations adopted by the NMB establish the procedure by which its jurisdiction may be invoked: (1) form NMB-3 "may" be submitted and (2) signed authorization cards from employees composing the craft or class "should" accompany the application. *See* 29 C.F.R. § 1203.2 (1979). These guidelines are precatory, not mandatory. Since none of these guidelines are mandated by the RLA, NMB action may not be overturned for failure to comply with these internal procedures. *See Railway Clerks,* 380 U.S. at 661. The NMB may properly assert jurisdiction without strict adherence to the regulations, if the letter and purpose of the statute are upheld.

However, even if we were to scrutinize the NMB's compliance with these regulations, we would find that the NMB could reasonably have determined on the basis of evidence before it that a representation dispute existed and that the statutory duty to investigate was triggered. IBT adhered to NMB procedures in filing its initial application. The correct application form was used and authorization cards well in

excess of the 35% threshold were submitted by employees in the disputed class or craft. No challenge is raised by plaintiff to the initial application. Plaintiff's challenge is directed to the amended application. Upon "amending" the application to represent plaintiff's employees to include two distinct bargaining units, a procedure not provided for in NMB guidelines, IBT submitted no new information on the separate classes or crafts in which a dispute was alleged. It was clear from the prior application that a representation dispute existed involving a substantial number of plaintiff's employees whose jobs were within one or another of the two putative classes or crafts. Under these circumstances, a decision to proceed with investigation in no way promotes "frivolous elections and determination proceedings" that the procedural guidelines were designed to prevent. *See American Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 866 (2d Cir. 1978).

Plaintiff also challenges the adequacy of the showing of interest. The NMB's finding that 35% of the employees in the unit desired IBT representation falls within the broad range of NMB discretion and will be upheld as it does not contravene a specific statutory provision.[3] *See Local 732 v. Nat'l Mediation Bd.*, 438 F. Supp. at 1364. *Cf. N.L.R.B. v. P.A.F. Equip. Co., Inc.*, 528 F.2d 286, 287 (10th Cir. 1976). (Under an analogous NLRB regulation "courts have uniformly held that the validity of the showing of interest is for administrative determination and may not be litigated by the parties, either Employer or Union.").

Plaintiff further claims that the authorization cards submitted with the initial IBT application on April 13, 1978 were "stale" and invalid. the NMB, however, acted under a regulation establishing a one year limit on the validity of authorization cards. *See* 29 C.F.R. § 1206.3 (1979). The authorization

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3 In fact, when the IBT application was amended there was still a sufficient showing of interest in the fleet or passenger service craft or class. When the application for an office and clerical unit was terminated for lack of interest, the number of authorization cards submitted for the remaining craft or class still exceeded the 35% threshold.

cards must be dated within one year of the date of application for investigation, not of the date a case is docketed. This NMB procedure promotes the statutory purpose "to avoid any interruption to commerce or to the operation of any carrier," 45 U.S.C. § 151a(1) (1976), and does not conflict with any specific statutory provision. Therefore, the regulation is valid and the NMB actions must be upheld.

Even if NMB jurisdiction was properly invoked, plaintiff claims that the NMB investigation to determine whether there existed a separate class or craft of fleet and passenger service employees was inadequate. Specifically, it is alleged that the NMB never investigated the functions of employees in fleet service or passenger service jobs to determine whether a bargaining unit combining fleet and passenger service employees was appropriate. This court has authority to review the NMB actions for compliance with the statutory duty to investigate. *Railway Clerks,* 380 U.S. at 661.

A NMB investigation need not provide a hearing, nor any other formal proceeding. *Railway Clerks,* 380 U.S. at 662. *See Ruby v. American Airlines,* 323 F.2d 248, 255 (2d Cir. 1963), *cert. denied,* 376 U.S. 913 (1964). The NMB has discretion to divide a craft or class of a single carrier into smaller units for collective bargaining purposes based upon prior NMB determinations, actual bargaining experience and the views of the parties. *Railway Clerks,* 380 U.S. at 665.

The class or craft of clerical, office, fleet and passenger service employees has been divided into sub-units in several recent NMB cases. *See American Airlines, Inc.,* No. R-4783 (December 13, 1978); *Canadian Pacific Airlines, Ltd.,* No. R-4853 (September 21, 1978); *Royal Hawaiian Air Service,* No. R-4807 (May 24, 1978); *TAN Airlines, Inc.,* No. R-4771 (February 3, 1978); *United Airlines, Inc.,* No. R-4550 (March 23, 1977). The NMB has stated that the "once common characteristics of the original grouping of [clerical, office, fleet and passenger service] employees . . . is being eroded by modern technology and job specialization." *Continental Airlines, supra,* p. 11. Prior NMB determinations, therefore, evidence a trend toward division of the original craft or class in this case

into one or more subclassifications. Obviously, each case may present factual issues of classification based upon "functional integration" and "work-related community of interest", *see Royal Hawaiian Air Service, supra,* p. 7, but a trend is evident. There are prior NMB determinations providing actual bargaining experience with these divided crafts or classes that serve to guide the NMB in determining what type of investigation is necessary. Finally, all concerned parties in the instant dispute, the prospective union representatives and Air Canada, had an opportunity to express their views on the propriety of the class division. An active investigation of the clerical and office class was conducted by the NMB after July 20, 1978. This included eight days of hearings investigating any distinction in duties, functions and community of interest between employees whose job titles fit within the class or craft of passenger and fleet service employees and those who might be regarded as office and clerical employees. *See IBT v. Air Canada,* No. R-4847 (May 24, 1979). The NMB studied and made some determination of overlapping functions between the two putative classes or crafts. *Id.,* p. 9-10. On May 24, 1979, the NMB found a separate class of office and clerical employees from fleet and passenger service employees, although it subsequently dismissed further certification proceedings as to office and clerical employees when faced with a low showing of interest in unionization among that class. The NMB then formally docketed the application of defendants to represent fleet and passenger service employees. After the remaining dispute regarding the fleet and passenger service class or craft was docketed, the carrier submitted two letters to the NMB stating its objections.

In light of prior NMB determinations, actual bargaining experience and the expression of the parties' views, we cannot say that the NMB violated the statutory mandate to investigate disputes by failing to engage in "necessary" investigations. We conclude that the NMB obtained jurisdiction over the dispute at issue and properly investigated the existence of such dispute in accordance with 45 U.S.C. § 152, Ninth.

Plaintiff further contests the conduct of the NMB in designating the ramp service employees as eligible voters and in certifying IBT as the representative of the class or craft of fleet and passenger service employees following the contested election. This is another area where the statutory basis of NMB authority permits, indeed requires, judicial oversight. The RLA, 45 U.S.C. § 152, Ninth, limits participations in elections to employees; employees are defined in 45 U.S.C. § 151, Fifth, as "person[s] in the service of a carrier." Plaintiff's claim is that the ramp servicemen were dismissed prior to the time the IBT application was filed and cannot, consistent with the statute, be considered eligible employees to vote in this election.

There is a dispute whether the ramp service employees were terminated because their work was subcontracted, as plaintiff contends, or because of union activities. This dispute is the subject of a pending action entitled *DeRespinas v. Air Canada*, 79 Civ. 0489 (S.D.N.Y.). On the basis of that action, the NMB regards the employment status of the ramp servicemen as unclear. Pursuant to NMB regulations, "[d]ismissed employees whose requests for reinstatement on account of wrongful dismissal are pending before proper authorities . . . are eligible to participate in elections among the craft or class of employees in which they are employed at the time of dismissal." 29 CFR 1206.6 (1979). This regulation is consistent with the statutory language of 45 U.S.C. § 152 Ninth, to "insure the choice of representatives by the employees without interference, influence or coercion" and the purpose of the RLA to speedily settle representation disputes without infringing upon employees' rights, *see* 45 U.S.C. § 151a (1976). The decision of the NMB to permit the ramp servicemen to vote in the representation election is consistent with the statute and must therefore be upheld.

Finally, the plaintiff contends that no class or craft of fleet and passenger service employees may be certified, because Air Canada does not employ anyone in a fleet service capacity and a class or craft of passenger service employees alone has not been found to exist. Plaintiff alleges that the only employees

that perform fleet service jobs are the ramp servicemen. All of the ramp servicemen were fired prior to the IBT application to represent a class of fleet and passenger service employees. Plaintiff concludes that no class of *fleet and passenger* service employees exists, but only a class of passenger service employees, and the NMB certification of the composite class is invalid.

The fulcrum of plaintiff's argument is the "fact" that the ramp servicemen are not employees entitled to labor representation. However, the status of the ramp service employees is not before us. The NMB may, consistent with the RLA, permit the ramp servicemen to vote. Thus, the answer to the "pure question of law" posed by the plaintiff in his memorandum is that the ramp service employees may be considered "employees" for voting purposes, at least until *DeRespinas* is decided.

In sum, we find the actions of the NMB in accepting jurisdiction over this representation dispute and in investigating the question of dividing an existing class or craft consistent with the statutory requirements of the RLA. The determination of eligible voters was also consistent with the RLA. Given the foregoing, the resulting certification of IBT was also justified. We have taken the material factual allegations of the supplemental complaint as true, but plaintiff fails to state a claim upon which relief can be granted. Defendants' motion to dismiss the supplemental complaint is therefore granted.

Defendants' motion to dismiss the supplemental complaint also requests an award of attorney's fees. Defendants contend that denial of a very similar request by plaintiff for temporary and preliminary injunctive relief indicates that the supplemental complaint was filed solely for delay. While plaintiff's legal arguments are quite similar in both the prior injunction action and the supplemental complaint, the issues raised in an action for injunctive relief justify plaintiff's conduct. In the injunction action, plaintiff could not show an irreparable injury and either probable success on the merits or serious questions on the merits and a balance of hardships tipping toward the plaintiff. We held only "that plaintiff is likely to fail on the merits" and that plaintiff made an insufficient showing of

irreparable harm. *Air Canada v. Nat'l Mediation Bd.*, 79 Civ. 4401, Memorandum Decision p.2. In this action plaintiff is entitled to a decision on the merits without having to prove an irreparable injury. Defendants' motion for an award of attorney's fees is denied.

The supplemental complaint is dismissed.

SO ORDERED.

United States District Judge

Dated: New York, New York
November 14, 1980

Appendix C

United States District Court Decision
Dated August 22, 1979

United States District Court

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 4401 (CES)

AIR CANADA,

Plaintiff,

—against—

NATIONAL MEDIATION BOARD: INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA ("IBT"); and LOCAL 732, IBT,

Defendants.

STEWART, *District Judge*:

Plaintiff Air Canada, by Order to Show Cause, seeks a temporary restraining order and a preliminary injunction staying the defendant National Mediation Board ("NMB") from conducting a representation election among Air Canada's fleet of passenger service employees. On April 13, 1978, the International Brotherhood of Teamsters ("IBT") filed a representation application covering the clerical and related office, fleet and passenger service employees. In May 1978, the IBT sought and was granted an amendment to the April application dividing the original single class into two classes: (1) the clerical and office employees and (2) the fleet and passenger service employees. The matter before us involves the fleet and passenger employees unit.

To grant plaintiff the relief requested there must be a showing of possible irreparable injury and either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Sonesta Int'l Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247, 250 (2d Cir. 1973). Plaintiff's application is denied because plaintiff is not likely to succeed on the merits—we lack jurisdiction to review most of the alleged errors of the NMB. As to the one claim which we may review, failure to investigate, it is clear from plaintiff's papers that plaintiff is likely to fail on the merits. Moreover plaintiff has made an insufficient showing of irreparable harm.[1]

Federal courts have very limited powers to interfere with NMB decisions in representation suits; judicial review is available only for instances of constitutional dimension or gross violation of the statute. *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 330 U.S. 650 (1965) (*"Railway Clerks"*); *Local 732, Intern. Bro. v. National Mediation Board*, 438 F. Supp. 1357 (S.D.N.Y. 1977). Plaintiff contends that the election which the NMB intends to conduct, unless restrained by us, would be in plain violation of the Railway Labor Act 45 U.S.C. §§ 151-158 ("RLA"). Plaintiff, in its brief, raises four possible violations. We will deal with each one separately.

First, it is claimed that NMB's decision to allow 79 employees whose employment was terminated two weeks before the IBT filed its representation application in April, 1978 to vote in the election violates Section 2, Ninth of the RLA, 45 U.S.C.

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1 Defendant NMB also moves to dismiss the complaint on the ground that this action is not ripe for adjudication, *United States v. Feaster*, 410 F.2d 1354 (5th Cir. 1969). Except for three exceptions judicial review of administrative determinations is generally limited to final orders or actions. In light of the form of plaintiff's claims however, should plaintiff successfully argue that judicial review is appropriate, the case would fall within one of those exceptions—that established in *Leedom v. Kyne*, 358 U.S. 184 (1958). *See Feaster, supra*, 1365 *Id.* at 1365.

§ 152, Ninth, which limits participation in these elections to "employees"—defined in Section 1, Fifth of the Act, 45 U.S.C. § 151, Fifth as "every person in the service of a carrier." NMB rule 1206.6, 29 C.F.R. 1206.6, however provides that:

> Dismissed employees whose requests for reinstatement on account of wrongful dismissal are pending before proper authorities which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at the time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis.*

There is a dispute here as to whether the 79 employees, all ramp workers, were terminated because their work was subcontracted as claimed by Air Canada, or whether they were terminated because of their activities in support of the Union as claimed by these former employees in a suit filed in this District. The NMB's conclusion that these employees were entitled to vote under Rule 1206.6 is not clearly contrary to the langugage of that rule.[2] Nor is that rule clearly contrary to the statute—indeed it is quite consistent with the purposes of the statute as set out in Section 1a of the Act, 45 U.S.C. § 151a(2) and (3).

Second, it is claimed that 40 current employees will be denied the right to vote by NMB's application of an election eligibility cut-off date of July 20, 1978. It is alleged that this violates "the statutory requirement that the Board investigate a current representation suit", the Board's policy set out in *Erie Railroad Co.*, Case No. R-2913, 3 NMB Determinations 187 (1955) and Section 304.4 of the Mediator's Manual which

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2 The clause "pending before proper authorities which includes the National Railroad Adjustment Board or other appropriate adjustment board," is not exclusive and the NMB could properly have construed it to encompass a suit such as the one presently pending in this district.

provide that the cut-off date be the last available payroll after the mediator commences his investigation of the property," and the Board's actual practice, which, it is alleged sets the cut-off date as the date of the furnishing of the employee list by the carrier. First, there is no clear statutory provision indicating that the Board may not under some circumstances impose a cut-off date which happens to be a year prior to the actual conduct of the election, *see System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginia Ry. Co.*, 11 F.Supp. 621, 627 (D.C. Va. 1935), *aff'd* 84 F.2d 641 (1936), *aff'd* 300 U.S. 515 (1937). Moreover, we do not think that the NMB's conduct was clearly violative of its policy statements. The mediator appeared at Air Canada's premises to conduct his investigation on two occasions. On June 20, 1978, the NMB informed Air Canada that a mediator would be sent to Air Canada's office on July 10, 1978 "to commence investigation of NMB Case No. R-4847 involving representation of (1) clerical and office employees; and (2) fleet and passenger service employees of Air Canada." In June, 1979 the NMB informed Air Canada that a mediator would be at Air Canada's office on June 26, 1979. The plaintiff proceeds on the assumption that the relevant time period under the policy statements is the date when the mediator arrived to investigate the fleet and passenger application alone (June 28, 1979). The NMB appears to have acted under the assumption that the relevant time period was the date on which the investigation was conducted on both units—July 20, 1978. The choice was the NMB's to make in the first instance and we cannot say that their choice was clearly contrary to their own policy guidelines. Even if it had been contrary to their guidelines, we do not think this rises to the level of a "gross violation of the statute." As to plaintiff's contention about the NMB's actual practice, plaintiff has cited to us four cases *Trans World Airlines,* Case No. R-4549; *American Airlines,* Case No. R-4783; *China Airlines,* Case No. R-4774 and *Royal Hawaiian Air Service,* Case No. R-4807, where the date on which the lists were supplied by the carrier was the operative cut-off date. This is far from a conclusive showing of a pattern

of practice. However, even if such a showing were made, we do not think that would be sufficient to vest us with power to review the NMB's determination.

Third, plaintiff contends that contrary to the express statutory requirements of Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, the Board never determined or conducted an investigation to determine that there is a craft or class of "passenger and fleet service" employees on Air Canada. Plaintiff's contention is similar to that made in *Railway Clerks, supra* and can be disposed of in like manner. The Supreme Court, defining the scope of judicial review of NMB's decisions, held that judicial review was appropriate to compel the NMB to exercise duties imposed under § 152, Ninth of the Act and that therefore "[T]he Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute." *Id.* at 661. In *Railway Clerks,* the employer argued that the NMB made an arbitrary determination in making a class and craft designation for the employees, without taking evidence or making findings. The Court indicated that

> We should note at the outset that the Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is "essentially informal, not adversary"; it is "not required to take any particular form."

Id. at 662. The Court held that the NMB had not failed to perform its statutory duty to investigate in that case because the unit initially chosen by the Board was well recognized under prior Board determinations and had proven satisfactory in actual experience, *Id.* at 665, and because the Board obtained the views of the parties on the question. *Id.* at 666. In this case, it is apparent from plaintiff's brief that breaking up the traditional clerical, office, fleet and passenger service employee units into sub-units has been recognized as viable and useful in the airlines industry since the *United Airlines,* R-4550 (March 23, 1977) decision. See Plaintiff's Memorandum of Law at 34. Moreover, a hearing was held by the NMB

"with respect to the functions, conditions of employement and possible interchange of office and clerical employees" Plaintiff's Memorandum of Law at 23, providing the NMB with necessary information on the viability of the clerical and related office worker's unit. It appears that, in light of *Railway Clerks* the Board is likely to prevail on its claim that it performed its statutory duty to investigate.

Plaintiff's final claim is that there was no evidence before the NMB of a current representation dispute among Air Canada's passenger and fleet employees as required by RLA Section 2, Ninth and in violation of NMB rules 1203.2, 1206.2 and 1206.3, 29 CRF 1203.2, §§ 1206.2 and 1206.3, because (a) no proper application for the NMB's services under § 2 Ninth has been filed, (b) no proper authorization cards have been filed, and (c) no proper showing of interest by 35% of the employees in the unit has been made. Although plaintiff refers to the RLA, the statute itself contains no clear mandate that any of these procedures be followed. The source of these requirements are the administrative regulations and:

> The courts have uniformly held that "the validity of the showing of interest is for administrative determination and may not be litigated by the parties, either Employer or Union."

N.L.R.B. v. P.A.F. Equip. Co., Inc., § 528 F.2d 286, 287 (10th Cir. 1976).

We also hold that plaintiff has failed to show irreparable harm. Plaintiff in ¶ 22 of its Complaint asserts that its relationship with its employees will be harmed by the inclusion of the 79 terminated employees in the balloting and by the posting of the "illegal" election notices, that its operations will be harmed by the month long balloting and that its employees' right to vote will be impaired. We do not see any substantial damage to employer-employee relations resulting from the conduct of this election even if it is ultimately set aside. We are not sure Air Canada can assert injuries to the voting rights of its employees, but in any event the employees rights can be equally protected by setting aside the election after balloting.

Finally Air Canada's claim of injury to its operations is speculative and would probably be minimal. We believe the damage caused by staying the election would be substantially greater than any damages which may result by allowing the balloting to go ahead.

For the reasons set forth plaintiff's application for a temporary restraining order and preliminary injunction is denied.

SO ORDERED.

United States District Judge

DATED: New York, New York
August 22, 1979.

Appendix D

Statutes and Regulations Involved

Railway Labor Act, 45 U.S.C. §§ 151 et seq.

Section 1. **Definitions** [45 U.S.C. § 151]

* * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. . . .

* * *

Section 2. **General Duties** [45 U.S.C. § 152]

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . .

* * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the

dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * *

Section 201. **Application of subchapter I to carriers by air** [45 U.S.C. § 181]

All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Section 202. **Duties, penalties, benefits, and privileges of subchapter I applicable** [45 U.S.C. § 182]

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof.

National Mediation Board Regulations, 29 CFR, Chapter X

Section 1206.6 **Eligibility of dismissed employees to vote.**

Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at the time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis.

Opposition

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No. 81-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AIR CANADA,

Petitioner,

v.

NATIONAL MEDIATION BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; AND TEAMSTERS LOCAL 732,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND TEAMSTERS LOCAL 732 IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was correct in dismissing Air Canada's supplemental complaint for failure to state a claim when the supplemental complaint's allegations, taken as a whole, showed that the National Mediation Board investigated a representation dispute on Air Canada's property in accordance with § 2, Ninth of the Railway Labor Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-287

AIR CANADA,

Petitioner,

v.

NATIONAL MEDIATION BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; AND TEAMSTERS LOCAL 732,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENTS INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND TEAMSTERS LOCAL 732 IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court dated August 22, 1979 (Pet., App. C) denying petitioner's application for a temporary restraining order and preliminary injunction is reported at 478 F. Supp. 615. The order of the Second Circuit Court of Appeals dated August 23, 1979 denying petitioner's motion for a temporary injunction pending appeal is unreported, and is set forth in the Appendix hereto. The opinion of the United States District Court dated November 14, 1980 (Pet., App. B) dismissing the supplemental complaint is unofficially reported at 107 L.R.R.M. 2028. The opinion

of the Second Circuit Court of Appeals (Pet., App. A) is unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the National Mediation Board's regulations are set forth in Appendix D of the Petition.

STATEMENT OF THE CASE

This litigation arose as the result of the National Mediation Board's ("NMB") investigation of a representation dispute among several crafts or classes of employees of Air Canada.[1] On April 13, 1978, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union") requested the NMB to investigate a representation dispute among the clerical, office, fleet and passenger service employees of Air Canada.[2] A. 263. Authorization cards from over 35 percent of the employees in this craft or class accompanied the Union's application. A. 263. By letter dated May 22, 1978, the Union amended the ap-

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[1] The facts set forth herein are drawn from the factual allegations contained in Air Canada's complaint and supplemental complaint, as well as materials attached thereto. References to portions of the record contained in the Appendix filed in the Court of Appeals appear as "A.", followed by a page number.

[2] The craft or class of clerical, office, fleet and passenger service employees was a residual unit for bargaining in the airline industry, composed of employee classifications left after other crafts or classes (e.g., pilots, flight attendants, mechanic and related) had been identified. *Continental Airlines, Inc.*, R-4448 (Nov. 11, 1977), Slip Op. at 10. Because it proved controversial and unsatisfactory, this craft or class has been consistently reevaluated by the Board. *United Airlines, Inc.*, 6 N.M.B. 180, 182 (1977).

plication, which had been assigned NMB Case No. R-4847, to cover two distinct crafts or classes: (1) clerical and office employees and (2) fleet and passenger service employees. A. 263.

The NMB assigned a mediator to investigate the representation question; he made his initial visit to Air Canada's property on July 10, 1978. A. 37. Commencing on September 19, 1978, the NMB conducted an eight-day hearing on the appropriateness of the clerical and office craft or class, during which both the Union and Air Canada were permitted to examine and cross-examine witnesses and introduce evidence. A. 43-44. On May 24, 1979, after considering extensive briefs and reply briefs, the NMB found that the clerical and office employees constituted a separate craft or class appropriate for representation apart from the fleet and passenger service employees. A. 44. That same date, the NMB docketed the fleet and passenger service application as NMB Case No. R-4929. A. 44.

After continuing his investigation on Air Canada's property on June 28, 1979, the mediator dismissed the application to represent the clerical and office craft or class due to an insufficient showing of interest, but found that the Union had obtained sufficient authorization cards to support its application to represent the fleet and passenger service craft or class. A. 45, 51, 266. The NMB authorized a mail ballot election among the fleet and passenger service employees to begin on August 24, 1979.[3] A. 266, 268. The eligibility list compiled for the election included all fleet and passenger service employees employed by Air Canada on July 9, 1978, including 74

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[3] Air Canada's appeal of the mediator's finding of a representation dispute among the fleet and passenger service employees was denied by the NMB on August 22, 1979. A. 270.

ramp servicemen who had been discharged by Air Canada on March 29, 1978.[4] A. 14, 266, 271.

On August 21, 1979, three days before the election was scheduled to begin, Air Canada filed an action in the district court for temporary injunctive relief, seeking to enjoin the representation election. A. 17-19. The district court denied the request for temporary and preliminary injunctive relief on August 22, 1979, noting it lacked jurisdiction over all but one of the aspects of the complaint. 478 F. Supp. 615. As to the one alleged aspect of the complaint which the district court believed it had jurisdiction to review, a supposed failure to investigate the representation dispute, the court concluded that Air Canada was likely to fail on the merits of this claim.[5] *Id.* at 618.

The election proceeded as scheduled, and the ballots were tabulated on September 15, 1979, with the following results (A. 272):

Number of Eligible Voters	515
Void Ballots	3
Votes Cast for Teamsters	305
Votes Cast for Others	12
Valid Votes Counted	317

On October 2, 1979, the NMB certified the Union as the bargaining representative of the craft or class of fleet and passenger service employees of Air Canada. A. 273.

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[4] The ramp servicemen, who are within the fleet service classification, filed suit in the United States District Court for the Southern District of New York on May 1, 1978, alleging that their discharges had been in retaliation for their union activities. *Derespinas* v. *Air Canada*, 79 Civ. 0489 (S.D.N.Y.). That action is presently pending.

[5] On August 23, 1979, the Second Circuit Court of Appeals denied Air Canada's request for a temporary injunction pending appeal. Appendix, *infra* at 1a.

Air Canada filed a supplemental complaint on November 2, 1979, seeking to void the NMB's certification. A. 258, 279. The district court, in a memorandum decision dated November 14, 1980, dismissed the supplemental complaint. 107 L.R.R.M. 2028. It held that the NMB had met the statutory requirements of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, in finding the existence of a representation dispute among Air Canada's fleet and passenger service employees. The Board's investigatory duty was satisfied by, *inter alia*, its holding of an eight-day hearing which dealt, *inter alia*, with interchange between the office and clerical and fleet and passenger service classifications. *Id.* at 2031. The district court further held that the NMB's rule (29 C.F.R. § 1206.6) permitting discharged employees to participate in elections if they have requests for reinstatement pending before proper authorities was consistent with the RLA's statutory directive mandating the speedy resolution of representation disputes in an atmosphere free of interference, influence or coercion. *Id.* at 2032. Accordingly, the district court upheld the NMB's determination that the discharged employees were eligible to vote. All of the Board's eligibility determinations, the court held, were consistent with the RLA's statutory requirements. *Id.* at 2032. On the basis of Air Canada's accepted factual allegations, the district court concluded that the NMB's conduct fully met all statutory requirements and dismissed the supplemental complaint. *Ibid.*

A panel of the Second Circuit Court of Appeals affirmed the district court's decision on April 9, 1981, the day following oral argument on Air Canada's appeal (Pet., App. A). The appellate court noted that the "form and extent" of the NMB's investigation is a matter "committed to the Board's discretion" (Pet., App. A., at 3a). It then reviewed the investigation conducted by the NMB, making specific reference to the following admitted facts:

> "[The NMB] held a hearing for several days concerning the clerical and office employees, at which evidence was considered relating to possible overlap between this group and fleet or passenger service employees; it collected information concerning employee sentiment, and the only party complaining of the Board's determinations was the employer, see *Brotherhood of Ry. & S.S. Clerks* v. *Assoc. for the Benefit of Noncontract Employees*, 380 U.S. 650, 666-67 (1965); it had, and relied upon, extensive experience with each of the categories of employees as well as with the overall, traditional class or craft; and the only factual basis upon which Air Canada ever claimed before the Board that a class or craft combining fleet and passenger service employees was improper was the argument that Air Canada had no fleet service employees." [Pet., App. A., at 3a.]

The court of appeals held that "the district court correctly concluded that it lacked power to interfere with the Board's discretionary determinations." [6] *Ibid.*

The Union was served with a copy of Air Canada's petition for a writ of certiorari on August 11, 1981.

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[6] Since the Court of Appeals agreed with the district court's rejection of Air Canada's objections to the NMB's conduct, it found it unnecessary to decide the Union's contention that the district court erred by assuming jurisdiction over those claims (Pet., App. A, at 3a).

ARGUMENT

I. THE DECISIONS BELOW ARE CONSISTENT WITH THE COURT'S PRECEDENTS, AND RAISE NO ISSUES WHICH HAVE NOT BEEN ADDRESSED BY THIS COURT PREVIOUSLY

This Court has made it clear on several occasions that judicial review of NMB decisions is extremely limited. *Switchmen's Union* v. *NMB*, 320 U.S. 297 (1943); *Railway Clerks* v. *Non-Contract Employees*, 380 U.S. 650 (1965). For Congress' intent in Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, "seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law. . . ." *Id.* at 659, quoting 320 U.S. at 305. "[T]he Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute. . . ." *Id.* at 661 (footnote omitted).

In *Switchmen's Union* v. *NMB*, *supra*, 320 U.S. at 305-06, the Court noted that when Congress had intended administrative action to be subject to judicial review, it had specifically so provided. See 45 U.S.C. §§ 153 and 159. This Court concluded "that Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under the other sections of the Act." *Id.* at 306. Thus, NMB action under § 2, Ninth, such as that taken here, may be examined by a reviewing court for the single purpose of determining whether the NMB fulfilled its statutory duty to investigate, a limitation recognized by both of the courts below.

Petitioner Air Canada contends that this Court has left open the question of whether NMB certifications are subject to review, pointing to an excerpt from this Court's decision in *Switchmen's Union*, *supra*, 320 U.S. at 307 (Pet., at 6). At the outset, even assuming the Court to

have left open the scope of review available when judicial enforcement of a certification is sought, and we submit that it did not, it is readily apparent that this issue is not raised here. This action is not for enforcement of the Board's certification. Rather, it is a typical suit by a carrier seeking to invalidate a certification. As such, this action represents simply another attempt, of which there have been many, to circumvent the congressional directive that representation disputes are to be resolved at the administrative level and not before the courts. *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. at 659. No novel or important issues requiring a resolution by this Court are presented.

Nor does the fact that challenges to certifications are resolved differently under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, have any bearing on this case. For more than forty-five years, Congress has not seen fit to change the RLA's procedures to comport with those contained in the NLRA. Congress' silence for so long speaks volumes, reinforcing its view that a different statutory scheme was necessary to insure harmonious labor relations in the airline and railway industries. Certainly, when and if the need arises to change the RLA's statutory scheme, "the responsibility to make that decision rests with Congress and not this court." *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *NMB*, 574 F.2d 394, 399-400 n.5 (8th Cir.), *cert. denied*, 439 U.S. 881 (1978).

Contrary to Air Canada's assertion, the lower courts' opinions did not depart in any respect from this Court's decision in *Non-Contract Employees*. In that case, this Court stated:

> "[T]he Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is essentially informal, not adversary; it is not required to take any particular form. . . . These principles are particularly apt here

> where Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." [*Railway Clerks* v. *Non-Contract Employees, supra*, 380 U.S. at 662 (citations and footnotes omitted).]

Over the years, the courts have declined to review the NMB's discretionary actions in representation cases despite a variety of legal challenges. *Sedalia-Marshall-Boonville Stage Line, Inc., supra*, 574 F.2d 394; *IBT* v. *BRAC*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968); *Aeronautical Radio, Inc.* v. *NMB*, 380 F.2d 624 (D.C. Cir.), *cert. denied*, 389 U.S. 912 (1967); *World Airways, Inc.* v. *NMB*, 347 F.2d 350 (9th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *WES Chapter* v. *NMB*, 314 F.2d 234 (D.C. Cir. 1962); *UNA Chapter, FEIA* v. *NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962); *Air Line Stewards & Stewardesses* v. *NMB*, 294 F.2d 910 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 810 (1962); *Decker* v. *Venezolana*, 258 F.2d 153 (D.C. Cir. 1958).

Thus, the overwhelming weight of judicial authority, including two definitive Supreme Court decisions, holds that the mechanics of a representation investigation are matters which Congress delegated to the NMB, and that the Board's discretionary actions are not subject to review by the courts. Courts are not permitted to examine the quality or result of an NMB investigation, but must confine themselves to the question of whether the NMB performed its statutory duty to investigate the dispute. *Railway Clerks* v. *Non-Contract Employees, supra*, 380 U.S. at 662; *Sedalia-Marshall-Boonville Stage Line, Inc., supra*, 574 F.2d at 398.

A review of the complaint, supplemental complaint and materials submitted by Air Canada in support of

both reveals that an investigation of the regrouping of the clerical, office, fleet and passenger service employees was conducted by the NMB. The NMB conducted an extensive hearing leading to identification of the clerical and office craft or class, and permitted Air Canada to participate fully in it. A. 12, 39, 43-45, 264. As a result of that hearing, the NMB determined that Air Canada's clerical and office employees shared a unique work-related community of interest, and that they constituted a separate craft or class under the Act. Air Canada admits that these facts occurred with the above resulting determination. A. 12-13.

Even though the NMB found a separate craft or class of office and clerical employees appropriate, Air Canada with apparent seriousness, asserted before the lower courts and continues to do so here that the NMB was disabled from finding appropriate a residual craft composed of its fleet and passenger service employees. Pet. at 13-14. There is absolutely no merit to this contention; nor does it present an issue warranting this Court's review.

Once having found that the office and clerical employees constituted a separate craft or class, the NMB breached no statutory duty in finding appropriate a fleet and passenger service craft or class. A fleet and passenger service craft or class had become well recognized under prior determinations of the NMB dealing with foreign flag and non-trunk domestic carriers.[7] See *Rail-*

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[7] Compare *Canadian Pacific Air Lines, Ltd.*, 6 N.M.B. 601 (1978); *Royal Hawaiian Air Service*, 6 N.M.B. 516 (1978); *TAN Airlines, Inc.*, 6 N.M.B. 393 (1978); *Continental Airlines, Inc.*, R-4448 (Nov. 11, 1977) with *United Airlines, Inc.*, 6 N.M.B. 180 (1977), *American Airlines, Inc.*, 6 N.M.B. 661 (1978) and *Air Florida*, 8 N.M.B. No. 181 (July 22, 1981). This last case, heavily relied upon by Air Canada herein, involved employees of a major carrier which has become prominent since the Airline Deregulation Act of 1978, 49 U.S.C. § 1301, *et seq.*, was enacted.

way Clerks v. *Non-Contract Employees*, *supra*, 380 U.S. at 665. Also, Air Canada's past election history showed the community of interest between fleet and passenger service employees. A. 262. The Board was intimately familiar with those employees' duties *from three prior investigations* on Air Canada's property. A. 262. Moreover, as the Court of Appeals noted (Pet., App. A, at 3a), Air Canada never urged that fleet and passenger service employees be divided during the administrative proceedings, instead claiming that it had no fleet service employees. A. 122, 269-75.

The NMB was fully aware of the relationship between and the functions of all groups of Air Canada employees involved in the dispute, and this was recognized by both of the lower courts. In reaching its decision, the court of appeals specifically pointed to the lengthy hearing dealing with overlap between the groups and the NMB's experience with these very same categories gleaned from three prior NMB investigations among Air Canada's office, clerical, fleet and passenger service employees (Pet., A. A, at 3a). Air Canada's argument that this case is distinguishable from *Non-Contract Employees* because the NMB did not perform an investigation with respect to the fleet and passenger service employees is contravened by the factual assertions contained in the supplemental complaint and attached materials, and this was readily apparent to both lower courts. Air Canada's argument herein is indistinguishable from that asserted and rejected by this Court in *Non-Contract Employees* and *Switchmen's Union*. Accordingly, Air Canada's petition presents no issues which have not previously been resolved by this Court. In addition, the lower courts' decisions are consistent with, indeed were compelled by, this Court's decision in *Non-Contract Employees*. Review by this Court is unwarranted.

II. THE NMB'S ELIGIBILITY DETERMINATIONS DO NOT RAISE IMPORTANT FEDERAL QUESTIONS WARRANTING REVIEW

Air Canada argues that the lower courts erred by upholding the NMB's eligibility determinations, and now seeks to have those determinations reviewed in this Court. The district court accepted Air Canada's contention that it had jurisdiction to review the NMB's determinations which (1) allowed discharged ramp servicemen to vote because their requests for reinstatement were pending in the *Derespinas* action, *supra* note 4, and (2) established specific cut-off dates for voter eligibility purposes. On the jurisdictional issue, the court of appeals stated that it agreed with the district court's rejection of Air Canada's claims on these issues, and therefore it was unnecessary to decide whether the court erred in assuming jurisdiction over these claims (Pet., App. A at 3a).

The district court's assertion of jurisdiction to review these determinations far exceeded the "limited exception" created by the Supreme Court in *Non-Contract Employees*. The district court was not permitted to entertain a "challeng[e to] the quality and result of that investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility made by the Board." *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *NMB*, *supra*, 574 F.2d at 398.[8] However, the district court's erroneous assertion of jurisdiction proved to be harmless, and the Court of Appeals agreed with the district

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[8] The eligibility of the ramp servicemen was determined by recourse to Section 1206.6 of the NMB's Regulations, 29 C.F.R. § 1206.6 (Pet., App. D, at 24a), which contradicts no specific prohibition of the RLA. Thus, Air Canada's argument with respect to the NMB's eligibility determinations falls far short of the required showing that the NMB violated an express statutory command, an element necessary to confer jurisdiction on the district court. *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

court's rejection of Air Canada's claims, thus finding it unnecessary to decide the jurisdictional issue. Although we contest the district court's authority to examine the NMB's eligibility determinations, once having asserted jurisdiction, the court correctly decided the issue. That decision does not raise any important Federal questions warranting this Court's review.

At the outset, the issue presented by Air Canada with respect to the Board's eligibility determinations presents the identical question resolved by this Court in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). There the Court held that the issue of whether the National Labor Relations Act's statutory definitions were satisfied was an issue of fact for the NLRB, and not a question of statutory construction for the courts. *Id.* at 481. Since the question of which forum should resolve whether a statutory definition has been met was resolved by this Court in *Boire*, there is no need to grant review here.

The lower courts' decisions with respect to the discharged ramp servicemen are in no way at variance with this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The ramp servicemen are not "retirees," who have "ceased work without expectation of further employment." *Id.* at 168. They are members of the active work force whose employment for Air Canada was terminated in violation of Section 2, Third and Fourth of the RLA, and they are vehemently contesting their dismissal in a Federal district court.[9] *Derespinas* v. *Air Canada*, *supra*.

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[9] In the case at bar, the NMB's eligibility determination with respect to the ramp servicemen had no effect on the outcome of the election. The total of eligible voters was 515, with 317 casting votes in favor of union representation. A. 272. This was well over the 258 votes necessary for a majority. Assuming *arguendo*, that all 74 of the ramp service employees voted, removing their votes would result in 243 votes in support of union representation, including 231 votes in favor of this Union. When the ramp service employees are subtracted from the number of eligible voters, 441 eligible voters remain. The number of votes necessary to obtain

It is undisputed that the district court is authorized to reinstate those ramp servicemen to their former employment upon a finding that Air Canada violated the Act. *Burke* v. *Compania Mexicana DeAviacion S.A.*, 433 F.2d 1031 (9th Cir. 1970); *Adams* v. *Federal Express Corp.*, 470 F. Supp. 1356 (W.D. Tenn. 1979). By upholding the NMB's determinations with respect to the discharged employees, neither of the lower courts acted inconsistently with this Court's directives contained in *Pittsburgh Plate Glass.*

The NMB rule in question, 29 C.F.R. § 1206.6 (Pet., App. D, at 24a), fully comports with the RLA's statutory mandate as it insures the speedy settlement of representation disputes in an atmosphere free of carrier interference, influence or coercion. 45 U.S.C. §§ 151a and 152, Ninth. In seeking a writ of certiorari, Air Canada relies on cases arising under the National Labor Relations Act which are plainly inapposite here. Nor is there any reason to engraft a procedure developed under a different statute, the NLRA, upon the NMB. As one Court of Appeals stated:

> "[T]he claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed . . . . For the courts to require the Mediation Board to transform itself into an adjudicative and prosecutorial agency like the NLRB or to impose themselves upon it would distort the entire Congressional scheme . . . ." [*Ruby* v. *American Airlines, Inc., supra*, 323 F.2d at 256.]

In short, the decision to incorporate the NLRA's statutory scheme into the RLA rests with Congress and not with this Court. *BRT* v. *Jacksonville Terminal Co.*, 394

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a majority becomes 221. Thus, exclusion of the ramp service employees decreases the Union's margin of victory but it does not change the result.

U.S. 369, 391-93 (1969). Accordingly, the fact that the NLRB proceeds differently in a similar context but under a different statute does not raise *any* issue, let alone one warranting this Court's review.

Finally, the spectre raised by Air Canada of carriers being forced to bargain with crafts or classes of terminated employees is wholly ephemeral. First, 29 C.F.R. § 1206.6 has been in effect for many years, and yet Air Canada is unable to cite one instance where this danger has materialized. In addition, it is an unfortunate fact of life that employees are sometimes discharged for their union activities, and their resort to court to vindicate their rights can hardly be termed cavalier or frivolous. *See Burke* v. *Compania Mexicana DeAviacion S.A.*, *supra*, 433 F.2d 1031; *Adams* v. *Federal Express Corp.*, *supra*, 470 F. Supp. 1356. The evil predicted by the NMB's use of this regulation has not occurred in the past; nor is there any reason to believe it will arise in the future. And, we are confident that the district courts are quite capable of quickly ending frivolous wrongful discharge suits.

Air Canada's final argument concerns the NMB's choice of a cut-off date for determining voter eligibility. It is well established that questions of voting eligibility are within the exclusive domain of the NMB. *WES Chapter* v. *NMB*, *supra*, 314 F.2d 234; *Decker* v. *Venezolana*, *supra*, 258 F.2d 153. Moreover, in choosing a cut-off date, the mediator acted pursuant to, and fully consistent with, the directives of ¶ 304.4 of the NMB's *Mediator's Manual*, which provides:

> "The list of potential voters should contain all individuals with employee/employer relationships as of the last payroll period(s) prior to the mediator's arrival on the property."

Section 152, Ninth of the RLA gives the NMB exclusive authority to "establish the rules to govern the election," 45 U.S.C. § 152, Ninth, and Air Canada has made no showing that the NMB contravened this provision. The

district court correctly held that the NMB's actions were consistent with the statutory directive. 478 F. Supp. at 617.

Air Canada's assertion that an important Federal question lurks in the NMB's eligibility determinations defies logic and reason. It is nothing more than an invitation to embroil an already overburdened Federal judiciary in the minutiae of day-to-day labor relations and the internal workings of the NMB. This Court has declined that invitation previously, *Boire* v. *Greyhound Corp.*, *supra*, 376 U.S. 473, and it should do so again here. There is not one aspect of the lower courts' decisions warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23 day of August, one thousand nine hundred and seventy-nine.

79-6162

AIR CANADA,
Plaintiff-Appellant

v.

NATIONAL MEDIATION BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ("IBT"), and LOCAL 732, IBT,
Defendants-Appellees

[Filed Aug. 23, 1979]

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated August 23, 1979 for a stay pending appeal be and it hereby is denied.

/s/ William H. Mulligan
WILLIAM H. MULLIGAN
Circuit Judge

[Received Aug. 28, 1979]

Opposition

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Office - Supreme Court, U.S.
FILED
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No. 81-287

In the Supreme Court of the United States

OCTOBER TERM, 1981

AIR CANADA, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Mediation Board's determination that a representation dispute existed among petitioner's fleet and passenger service employees is judicially reviewable.

2. Whether the National Mediation Board fulfilled its statutory duty to investigate the representation dispute among petitioner's fleet and passenger service employees.

3. Whether the National Mediation Board violated the Railway Labor Act in determining that certain employees who had been discharged by petitioner but who have been actively contesting their dismissals were entitled to vote in the representation election.

4. Whether the National Mediation Board violated the Railway Labor Act in establishing the cut-off date for eligibility to vote in the representation election.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-287

AIR CANADA, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The opinion of the district court (Pet. App. 5a-14a) is unofficially reported at 107 L.R.M.M. 2028. The prior opinion of the district court denying a temporary restraining order and a preliminary injunction (Pet. App. 15a-21a) is reported at 478 F. Supp. 615.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1981. The petition for a writ of certiorari was filed, after an extension of time, on August 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth provides:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT

This case involves the selection of a labor representative for a class or craft of employees of petitioner Air Canada.

The principal issue presented is whether the National Mediation Board (NMB) properly carried out its duties under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, in certifying the International Brotherhood of Teamsters (Teamsters) as the labor representative of a class or craft of petitioner's fleet and passenger service employees.

1. On April 13, 1978, the Teamsters filed an application with the NMB to represent a single class or craft consisting of petitioner's clerical, office, fleet and passenger service employees (Pet. App. 6a). Subsequently, the Teamsters sought to amend their application by dividing the original class into two classes for representation purposes—one composed of clerical and office employees and the other composed of fleet and passenger service employees (*id.* at 6a-7a).

The NMB docketed the clerical and office employees case and conducted an investigation of that unit that included eight days of hearings (Pet. App. 7a). The investigation focused, *inter alia*, upon "any distinction in duties, functions and community of interest between employees whose job titles fit within the class or craft of passenger and fleet service employees and those who might be regarded as office and clerical employees * * *" (*id.* at 11a). After examining the degree of overlapping functions between the two putative classes or crafts, the NMB concluded that a separate class or craft of clerical and office employees existed, but it dismissed the representation request pursuant to 29 C.F.R. 1206.2 because fewer than 35% of the employees in the unit desired representation by the Teamsters (Pet. App. 7a, 11a).

The NMB proceeded to consider the representation request with respect to the passenger and fleet service employees. It appointed a mediator to investigate and, on July 26, 1979, the mediator concluded that the Teamsters had filed a proper representation application (Pet. App.

7a). On August 3, 1979, the NMB determined that a dispute existed as to representation of fleet and passenger service employees and it scheduled an election (*ibid.*). The NMB permitted 74 employees (ramp servicemen) who had been dismissed prior to the election to vote because they were contesting their dismissal in a case before a federal district court (*id.* at 12a, 16a-17a). The NMB also set July 20, 1978, as the cut-off date for employee voter eligibility because that was the last payroll after the mediator appeared on petitioner's premises to investigate the dispute (*id.* at 17a-18a).

2. Three days before the scheduled election, petitioner filed this action in the United States District Court for the Southern District of New York, seeking a temporary restraining order and a preliminary injunction staying the election. On August 22, 1979, the district court denied petitioner's requests for temporary and preliminary injunctive relief (Pet. App. 15a-21a). After the conclusion of the election, the NMB certified the Teamsters as the representative of petitioner's class or craft of fleet and passenger service employees (*id.* at 7a).

Petitioner then filed a supplemental complaint in the district court, challenging the NMB certification procedure on several grounds. The district court granted respondents' motions to dismiss the supplemental complaint (Pet. App. 5a-14a). The court concluded that the NMB had properly determined that a representation dispute existed and had properly investigated that dispute (*id.* at 8a-11a). The court also ruled that no error had been made with regard to voter eligibility (*id.* at 12a-13a).

The court of appeals affirmed (Pet. App. 1a-4a). The court held that the NMB had fulfilled its statutory duty of investigating the representation dispute and thus "the district court correctly concluded that it lacked power to interfere with the Board's discretionary determinations" (*id.* at

3a). The court also agreed with the district court's rejection of petitioner's other contentions and, therefore, did not reach the question whether the district court "erred in assuming jurisdiction over the other claims" (*ibid.*).

ARGUMENT

The decision of the court of appeals applies settled legal principles to reach a correct result. The decision does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 6-9) that the courts below applied too narrow a standard of judicial review in upholding the certification procedures employed by the NMB. Specifically, petitioner asserts (Pet. 7) that this Court has left unsettled the scope of judicial review of NMB certification decisions in circumstances such as those presented here, and that this case is an appropriate one in which to resolve the issue. These assertions are insubstantial.

Both courts below correctly recognized (Pet. App. 3a, 8a, 16a) that judicial review of NMB decisions is quite limited. Indeed, nearly 40 years ago this Court held that the determination of which competing labor organization is to represent particular employees is a matter within the exclusive jurisdiction of the NMB and is not reviewable by the courts. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300-301 (1943); *General Committee of Adjustment* v. *Missouri-Kan.-Tex. R.R.*, 320 U.S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338 (1943). This Court adhered to the principle of finality of NMB determinations in *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965). There, as here, a carrier challenged the NMB's determination of the relevant craft or class of the carrier's employees. Declining to examine the NMB's judgment in this area, the Court held that "the Board's action here is reviewable *only* to the extent

that it bears on the question of whether it performed its statutory duty to investigate the dispute." *Id.* at 661 (emphasis added). In view of this holding, petitioner is incorrect in asserting that this Court has left open the question whether an NMB certification issued following an investigation is judicially reviewable.[1]

The district court in this case noted the limited nature of its review and stated that its "obligation is to determine whether the actions of the NMB under the [Railway Labor Act] meet statutory requirements" (Pet. App. 8a). The court thereupon inquired into whether the NMB had fulfilled its statutory duty to investigate the representation dispute (*id.* at 10a-11a). The court of appeals agreed with the district court's resolution of this issue. This exercise of jurisdiction is consistent with settled principles of judicial review of NMB certification procedures and does not warrant further review.

2. Petitioner contends (Pet. 9-15) that, contrary to the decision below, the National Mediation Board did not fulfill its statutory duty under 45 U.S.C. 152, Ninth to investigate the composition of the craft or class entitled to vote on the question of union representation. This contention is without merit.

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[1]Consistent with this Court's decisions, the lower courts have limited review to "instances of constitutional dimension or gross violation of the [Railway Labor Act]" (Pet. App. 16a). See, *e.g.*, *Airline Pilots Association* v. *Texas International Airlines, Inc.*, No. 80-9102 (2d Cir. July 29, 1981); *Hawaiian Airlines, Inc.* v. *National Mediation Board*, No. 79-4265 (9th Cir. July 24, 1981); *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Board*, 574 F. 2d 394, 396-398 (8th Cir. 1978), cert. denied, 439 U.S. 881 (1979); *International In-Flight Catering Co.* v. *National Mediation Board*, 555 F. 2d 712, 717-718 (9th Cir. 1977); *International Brotherhood of Teamsters* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 402 F. 2d 196, 204-205 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968).

While the Railway Labor Act requires the NMB to "investigate" the representation dispute, the Act does not require any particular kind of investigation. Rather,

> the Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is "essentially informal, not adversary;" it is "not required to take any particular form." * * * These principles are particularly apt here where Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case.

Brotherhood of Ry. & S.S. Clerks v. *Association for the Benefit of Non-Contract Employees, supra*, 380 U.S. at 662 (footnote and citation omitted).

The district court correctly concluded on the facts of this case that the NMB "properly investigated the existence of [the representation] dispute in accordance with 45 U.S.C. §152, Ninth" (Pet. App. 11a). The district court's conclusion was based on prior NMB determinations, actual bargaining experience and the views of the parties. The court noted a trend toward dividing the class or craft of clerical, office, fleet and passenger service employees in NMB air carrier certification decisions into sub-units (*id.* at 10a-11a).[2] Moreover, actual bargaining experience with these sub-units provided the NMB with guidance in determining the appropriate unit.

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[2]By the time petitioner's administrative appeal was heard the NMB had found a fleet and passenger service craft or class on six other carriers, in two of which a certification had issued. *Southern Airways, Inc.*, No. R-4892, 6 N.M.B. 729 (1979); *Royal Hawaiian Air Service*, No. R-4807, 6 N.M.B. 516 (1978); *Canadian Pacific Airlines, Ltd.*, No. R-4853, 6 N.M.B. 601 (1978); *Altair Airlines, Inc.*, R-4804, 6 N.M.B. 484 (1978) (certification issued); *Aerocondor Airlines*, No. R-4940, 6 N.M.B. 807 (1979) (certification issued); *Aer Lingus*, No. R-4759, 6 N.M.B. 342 (1977).

Similarly, the court of appeals pointed out that (Pet. App. 3a; citation omitted):

> [i]n this case, the Board had under its consideration a petition to certify both classes; it held a hearing for several days concerning the clerical and office employees, at which evidence was considered relating to possible overlap between this group and fleet or passenger service employees; it collected information concerning employee sentiment, and the only party complaining of the Board's determination was the employer * * *; it had, and relied upon, extensive experience with each of the categories of employees as well as the overall, traditional class or craft; and the only factual basis upon which Air Canada ever claimed before the Board that a class or craft combining fleet and passenger service employees was improper was the argument that Air Canada had no fleet service employees. Under these circumstances, the district court correctly concluded that it lacked power to interfere with the Board's discretionary determinations.

The conclusion of both courts below that the NMB fulfilled its statutory duty to conduct an investigation is plainly correct. See *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, *supra*, 380 U.S. at 662-666.

3. Petitioner contends (Pet. 15-20) that the NMB made two erroneous determinations concerning voter eligibility. Specifically, petitioner asserts (Pet. 15) that the NMB "violated the Railway Labor Act by treating as employees for purposes of the representation election 74 ramp servicemen who were dismissed two weeks before the [Teamsters] representation application was filed," but who were and are actively contesting their dismissals in a case pending in federal district court (*Derespinas* v. *Air Canada*, 79 Civ. 0849 (S.D.N.Y.)). Petitioner also asserts (Pet. 18-20) that

the NMB wrongfully excluded 49 passenger service employees from voting by establishing an eligibility cut-off date 13 months prior to the election. The district court concluded (Pet. App. 12a, 18a) that it had jurisdiction over these claims, but rejected both claims on the merits. The court of appeals held that (Pet. App. 3a): "[i]n light of the district court's rejection of Air Canada's other objections, with which we agree, we need not decide whether the court erred in assuming jurisdiction over the other claims."

a. At the outset, we submit that the lower courts did not have jurisdiction to consider these issues. The Railway Labor Act does not specify who is eligible to participate in NMB conducted elections. Rather, the Act gives the NMB exclusive jurisdiction to "designate who may participate in the election and establish the rules to govern the election * * *." 45 U.S.C. 152, Ninth. Accordingly, pursuant to this Court's decisions in *Railway Clerks* and *Switchmen's Union*, the district court did not have jurisdiction to review the NMB's voter eligibility determinations. See *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Board, supra*, 574 F. 2d at 398-399 (challenge to NMB voter eligibility determinations not judicially reviewable). Accord, *WES Chapter* v. *National Mediation Board*, 314 F. 2d 234, 236-237 (D.C. Cir. 1962); *Decker* v. *Venezolana*, 258 F. 2d 153, 154 (D.C. Cir. 1958).

b. In any event, as the court of appeals noted (Pet. App. 3a), petitioner's complaints are insubstantial. The NMB permitted the discharged employees to vote in the representation election on the basis of 29 C.F.R. 1206.6, which provides:

> Dismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities, which include the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the

craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis.

Since the discharged employees are actively contesting their discharge before a federal district court, which is empowered to order their reinstatement, the NMB correctly applied its own regulation in permitting them to vote. Moreover, as the district court found (Pet. App. 12a), the regulation is consistent with the Railway Labor Act because it facilitates speedy resolution of representation disputes without interfering with the employees' choice of representation.[3]

c. The lower courts also correctly rejected petitioner's claim that the cut-off date for voter eligibility was set too far in advance of the election. While petitioner recognizes (Pet.

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[3]Contrary to petitioner's assertions (Pet. 16), the district court's resolution of this issue is not inconsistent with *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), where this Court held that retired workers who had "ceased work without expectation of further employment" were not "employees" under the National Labor Relations Act. By contrast, the dismissed employees in this case, who are actively challenging their discharge, have an expectation of further employment.

Petitioner relies (Pet. 17-18) on decisions under the National Labor Relations Act for its assertion that the NMB should have deferred resolution of the representation dispute until after the dismissal suit was decided. These decisions are not applicable to the NMB, however, because, as one court of appeals has put it, "[f]or the courts to require the Mediation Board to transform itself into an adjudicative and prosecutorial agency like the N.L.R.B. or to impose themselves upon it would distort the entire Congressional scheme." *Ruby* v. *American Airlines*, 323 F. 2d 248, 256 (2d Cir. 1963). See also *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, *supra*, 380 U.S. at 670-671. Moreover, it would frustrate the statutory purpose of the Railway Labor Act to permit a carrier to defer resolution of a representation dispute by the simple expedient of engaging in protracted litigation concerning employees it has dismissed.

19) that "some cut-off date for an election is surely required to permit orderly administration of the election process," it asserts that the cut-off date selected in this case improperly excluded 49 passenger service employees from voting.

The NMB established the cut-off date as of July 20, 1978, within 10 days of the mediator's initial appearance at petitioner's offices to investigate representation of both the clerical and office employees and the fleet and passenger service employees (Pet. App. 18a). In setting this cut-off date, the NMB acted pursuant to paragraph 3.503-5 of its *Mediator's Manual* (Jan. 1, 1980), which provides that "[t]he list of potential eligible voters should contain all individuals with employee/employer relationships as of the last day of the last payroll period(s) prior to the mediator's arrival on the property." The cut-off date provision ensures that the employer may not endeavor to control an election by adding new employees after an investigation begins. Since the Act provides that the NMB has discretion to "designate who may participate in the election and establish rules to govern the election * * *," the district court was surely correct in concluding (Pet. App. 18a) that "[t]he choice [of the cut-off date] was the NMB's to make in the first instance and we cannot say that their choice was clearly contrary to their policy guidelines." At all events, there is no occasion for this Court to review the NMB's exercise of discretion in making its voter eligibility determination in this particular case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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IN THE

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AIR CANADA,

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—v.—

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORAR!

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I

The federal respondent asserts that "the decision of the court of appeals applies settled legal principles to reach a correct result" (F.R. Br., p. 5). Apparently the legal principles which the federal respondent conceives as settled are:

1. Judicial review of a Board certification is limited to the question of whether the Board performed its statutory duty to investigate, since this Court did not leave open the question of whether certification is reviewable to determine whether the findings on which it is based were made in violation of the Railway Labor Act;

2. Under the *Railway Clerks* case, the Board will be held to have conducted the necessary statutory investigation on the mere recitation—by the court—of alleged prior Board deter-

minations, actual bargaining experience, and knowledge of the duties of the job classifications, such as this Court relied on in *Railway Clerks*, even though such support is transparently non-existent in the case under consideration, and was not even asserted by the Board; and

3. The determination by the Board that non-employees are employees, and that employees may be treated as non-employees, despite the explicit command of the Railway Labor Act that only a majority of the employees in a craft or class may select a representative is not reviewable, since those determinations are mere discretionary decisions on "voter eligibility", rather than statutory construction of the term "employee."

None of those alleged principles of law can withstand scrutiny. Since the decision below furthers those "principles," the petition should be granted.

1. The federal respondent seems to claim that *Railway Clerks* answered the question left open by *Switchmen's Union* (F.R. Br., p. 6). But the unanswered question in *Switchmen's Union*[1] was the extent of reviewability of the findings on which a certification is based "when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a

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1 *Switchmen's Union* was an attempt by one union to set aside a certification issued by the Board in favor of another union. Unions are parties to proceedings before the Board to resolve their representation disputes, and this Court said that the Act did not intend that controversy to be dragged out in the courts. 320 U.S. at 305. A carrier, however, is not a party to those proceedings or that controversy (*Railway Clerks*, 380 U.S. at 666). When it challenges the enforcement of a certification against it, therefore, the carrier is not "dragging out" any controversy in court, but asserting its right not to be subjected to statutory obligations if the certification was made in violation of the statute. It seems clear that this Court foresaw that that problem would arise and did not attempt an answer in a case involving only two unions. Reviewability limited to "instances of constitutional dimension or gross violation of the [Act]", which the federal respondent asserts is the standard adopted by the lower federal courts, was in fact put forward as a formulation in only one of the five cases cited (F.R. Br., p. 6, fn.1), which was not concerned with a certification and also involved two unions, one of which sought to enjoin an NMB election. *International Brotherhood of Teamsters v. Brotherhood of Ry. & S.S. Clerks*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968).

certificate of the Mediation Board", 320 U.S. at 307, citing the *Virginian Ry.* case, including the statement, "whether the certification if made as to those facts [*i.e.*, the number of eligible voters, the number participating in the election, and the choice of the majority of those who participate] is conclusive, it is unnecessary now to determine." 300 U.S. at 562. The *Railway Clerks* case did not involve a certification at all. This Court, therefore, could not have adhered "to the principles of finality of NMB determinations in [*Railway Clerks*]" (F.R. Br., p. 5), if that statement is meant to suggest that the Court answered the question about the finality of certifications.

2. Both respondents implicitly concede that, in Case No. R-4929, the Board conducted no investigation whatsoever of the duties of the alleged fleet service employees or of the passenger service employees, and thus made no effort to determine, on evidence, whether those two groups of employees belonged together in one unit, or whether they constituted two separate crafts or classes.[2] It is absolutely clear from the statement of the federal respondent that the Board proceeded immediately from the determination of its mediator, on July 26, 1979, that there was a proper representation application covering alleged fleet service and passenger service employees, to a direction of an election eight days later, on August 3, 1979, without any intervening investigation as to the duties of those alleged employees. (F.R. Br., pp. 3-4). And it is equally clear from the IBT's erroneous reliance on a "residual unit", "Air Canada's past election history", and "three prior [nonexistent] investigations among Air Canada's office, clerical, fleet and passenger service employees" (IBT Br., pp. 10-11) that there was no investigation of craft or class in Case No.

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2 The court of appeals did not adopt the finding by the district court about Board examination of the duties of passenger and fleet service employees (F.R. Br., p. 3), but said, more accurately, that the Board held a hearing "concerning the clerical and office employees, at which evidence was considered relating to possible overlap between this group and fleet or passenger service employees". (Pet., 3a). The record establishes beyond contradiction that no evidence of the duties and functions of alleged fleet service and passenger service employees was taken in Case No. R-4847 (A-303, A-82, A-99, A-101, A-106-107), and there is no contention that such evidence was taken in Case No. R-4929.

R-4929 on which the IBT could rely. Nor had an identifiable fleet service and passenger service employees craft or class become generally recognized in the industry, as the R-1706 craft or class had been by the time of the *Railway Clerks* decision in 1965.[3]

In the absence of any factual investigation of alleged fleet service and passenger service employees in Case No. R-4929,

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3 It is incredible that the federal respondent cites six Board cases (F.R. Br., p. 7, fn. 2) to suggest that they justify the Board's ordering of an election among alleged fleet service and passenger service employees of Air Canada without a craft or class investigation, when in the four in which the Board wrote decisions, it had conducted investigations, and said repeatedly, in those cases, that whether there was a combined fleet service and passenger service craft or class and which job classifications were included depended on a case-by-case examination of the facts on each carrier. Thus, in *Royal Hawaiian Air Service, Inc.*, 6 NMB 516 (1978), the Board said:

> "The standard utilized by the Board in determining the existence of a craft or class focuses on work classification, functional integration, and work-related community of interest. *See Continental Airlines, Inc.*, R-4448 (NMB November 11, 1977); *Aer Lingus*, R-4759 (NMB December 14, 1977); *Tan Airlines, Inc.*, R-4771 (February 8, 1978); and *China Airlines, LTD.*, R-4774 (NMB March 22, 1978). Applying this standard in a case-by-case approach has produced different results. In *United Airlines, Inc.*, R-4550 (NMB March 23, 1977) the Board found that under the particular circumstances of that case, passenger service classifications were not functionally integrated with either fleet service or office-clerical classifications. Under entirely different circumstances, in *Aer Lingus, supra*, the Board determined that fleet and passenger service employees had substantial common collective bargaining interests which placed them in a craft or class separate from office-clerical classifications."

In *Canadian Pacific Air Lines, Ltd.*, 6 NMB 601 (1978), moreover, citing *Aer Lingus*, 6 NMB 342 (1977), *TAN Airlines, Inc.*, 6 NMB 393 (1978), and other cases, the Board said, "In decisions, subsequent to *Continental Airlines, Inc.* R-4448 (NMB November 11, 1977), the Board has adhered to a case-by-case determination." 6 NMB at 605.

The IBT, with the same utter disregard for the Board's case-by-case approach, cites *Canadian Pacific*, *Royal Hawaiian*, *TAN*, and, of all cases, *Continental Airlines*, in purported support of its assertion that a "fleet and passenger service craft or class had become well recognized under prior determinations of the NMB dealing with foreign flag and non-trunk domestic carriers." (IBT Br., p. 10). The above quotation from the *Royal Hawaiian* case shows that the Board made no distinction between foreign and domestic airlines, trunk or non-trunk, and did not regard an undefined fleet and passenger service craft or class as established.

the federal respondent is compelled to assert that here, as in *Railway Clerks*, the Board's statutory duty to investigate was fulfilled by its reliance on "prior Board determinations," "actual bargaining experience," "the views of the parties," and "experience with each of the categories of employees" (F.R. Br., pp. 7-8). Those factors were considered sufficient in *Railway Clerks* because they had resulted, after an initial comprehensive factual investigation in 1947 and fifteen years of experience and bargaining, in recognition that the R-1706 craft or class was established in the industry. Here there was no such evolution of an alleged fleet and passenger service craft or class, there was no such comprehensive factual investigation at which the views of the parties were taken (on the contrary, the Board said repeatedly there had to be a case-by-case examination), and there was no bargaining experience which could confirm a fleet and passenger service unit as the appropriate one.[4] It is simply a travesty for the federal respondent to assert that the Board here acted in conformity with *Railway Clerks*. (See Pet., pp. 9-15).

3. On the issue of whether the Board violated the Railway Labor Act in permitting discharged employees to vote, again, the federal respondent is forced to distort the facts in order to make the Board's action arguably not a violation of the statute. The statement that the "NMB permitted 74 employees (ramp servicemen) who had been dismissed prior to the election, to vote because they were contesting their dismissal" (F.R. Br., p. 4) does not accurately convey that the fleet service employees were dismissed on March 29, 1978, two weeks before the Teamsters even filed an application to represent the established craft or class of office, clerical, fleet service and passenger service employees, on April 13, 1978.[5] . The employees, allegedly dismissed "prior to the election," in fact ceased to be employees two weeks before any application was

4 As recently as July 22, 1981, the Board found a separate fleet service employees and a separate passenger service employees craft or class on Air Florida. 8 NMB No. 181.

5 It should be obvious that the discharge of the 74 ramp servicemen (the only fleet service employees Air Canada had), because their work was subcontracted, assured their support for the representation application which the IBT filed *two weeks later*.

filed, almost sixteen months before the Board determined that there was a proper application for a unit of alleged fleet service and passenger service employees (F.R. Br., p. 3), and seventeen months before the election. Indeed, the certification itself refers to them as "former Fleet Service employees." (A-350).

In the same bland way in which it excuses all of the Board's improper actions, the federal respondent discusses the disenfranchisement of 10% of the employees because they had not been employed for at least 13 months before the election as though it entirely complied with the Act. When the Board established the cut-off date for the August 3, 1979 election,[6] the Board fixed the eligibility date for employees by reference to the asserted start of the investigation in Case No. R-4929. Whenever the investigation began, it is impossible to see how July 9, 1978 can be justified as the appropriate date to fix the eligibility of alleged fleet service and passenger service employees to vote in an election which was not ordered until August 3, 1979, immediately after the Board's mediator, having had the case assigned to him on June 21, 1979, first concluded that the Teamsters had filed a proper representation application covering those employees.

For the first time, the federal respondent now says that the reason for linking the cut-off date to the mediator's first visit is so that "the employer may not endeavor to control an election by adding new employees after the investigation begins." (F.R. Br., p. 11). There is no support whatsoever in the record, or in the *Mediator's Manual*, or, what is more to the point, in the statute, for such an explanation. On the contrary, it is apparent that the *Mediator's Manual* fixed the cut-off date by

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6 Actually, the cut-off date was July 9, 1978, the last payroll date before the Board mediator's first appearance at Air Canada's property on July 10, 1978. On July 20, 1978, however, the Board itself limited the investigation which had begun on July 10, 1978, to the dispute as to whether there should be a separate office and clerical unit. The date of the beginning of the investigation of the application to represent fleet service and passenger service employees should be irrelevant to determination of who are employees at the time of the election, but the record shows that the Board assigned a mediator "to commence investigation" of that application in Case No. R-4929 on June 21, 1979. (A-359, A-375).

reference to the mediator's arrival on the property only in connection with the anticipated preparation of a list of potentially eligible voters *at that time*, for a showing of interest check *at that time*, in anticipation of an election *at that time*.

Here, however, the Board itself decided that it could not conduct an election at that time. Nothing in the Railway Labor Act authorized the Board thereafter to exclude employees hired in the 13 months preceding the election which was delayed by the Board itself,[7] on the latter-day explanation that such exclusion is necessary in order to avoid the possibility that the carrier selectively added employees during the Board-ordered delay.

Alleged discriminatory hiring is clearly remediable without an arbitrary rule which does not focus on that question. The Board has specific statutory authority to "insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier." RLA, Section 2, Ninth, 45 U.S.C. § 152 Ninth; *Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492, 497 (N.D. Cal. 1976). It has exercised that authority in many cases. *See, e.g., Laker Airways, Ltd.*, 8 NMB No. 79 (February 24, 1981); *Zantop International Airlines, Inc.*, 6 NMB 834 (1979). Given the ready availability of such means to prevent the precise abuse which the Board now claims to fear, a broad-axe rule which cuts off the voting rights of 10% of the employees at the time of the election violates the command of the statute that the majority of employees in a craft or class shall have the right to select a representative. See *Dunn v. Blumstein*, 405 U.S. 330, 345, 351 (1972).

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7 The carrier urged the Board to consider the possible craft or class of fleet service and passenger service employees in the same hearing which considered the office and clerical employees, but the Board refused. (A-82, A-99, A-101, A-106). It procured the list of eligible voters in Case No. R-4929 as of June 30, 1979 (A-167), and checked the showing of interest in July, 1979. (A-142).

II.

The union respondents undertake to assure the Court that the case was decided within accepted legal principles by misstating the facts or the authorities so as to make it appear that the legal principles are satisfied, as follows:

1. The IBT cites the Board's *Continental Airlines* case as establishing, contrary to all other Board *published* decisions, that the "craft or class of clerical, office, fleet and passenger service employees was a residual unit . . ." (IBT Br., p. 2, fn. 2). *Railway Clerks*, however, thoroughly examined that R-1706 unit and concluded that it was the result of extensive Board investigation and experience, saying nothing about a residual unit.

2. Seeking explanations in one "residual" unit after another where there are none, the IBT says that the Board could find appropriate "a residual craft composed of . . . [Air Canada's] fleet and passenger service employees" (IBT Br., p. 10). The Board did not, however, either in this case or in any other case, find a residual craft or class of fleet and passenger service employees. See *Continental Air Lines*, R-4448, quoted on pages 12-13 of the Petition.

3. Equivocating on the Board's failure to investigate the duties and functions of alleged fleet service and passenger service employees, the IBT treats the two representation applications before the Board (Case No. R-4847, involving the office and clerical employees, and Case No. R-4929, involving alleged fleet service and passenger service employees) as though they were one case, and as though the investigation in the first case can serve as the investigation in the second case.[8]

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8 It is not true that "After continuing his investigation on Air Canada's property on June 28, 1979, the mediator dismissed the application to represent the clerical and office craft or class . . . but found that the Union had obtained sufficient authorization cards to support its application to represent the fleet and passenger service craft or class." (IBT Br., p. 3). On June 8, 1979, the mediator checked the showing of interest in Case No. R-4847, and on June 11, 1979, the Board dismissed that case for insufficient showing of interest (A-45). The other case, R-4929, after being docketed on May 24, 1979 (IBT Br., p. 3), was assigned to a mediator on June 21, 1979 (A-359) "to

4. The IBT says this action "is not for enforcement of the Board's certification. Rather, it is a typical suit by a carrier seeking to invalidate a certification." (IBT Br., p. 8). The action is clearly one to prevent enforcement of the Board certification; the lack of any authority to support the IBT's statement about carriers seeking to invalidate a certification shows that it is not at all typical. The only case cited by the IBT in proximity to that statement is the *Railway Clerks* case, which was not a suit to invalidate a certification.

5. Among the most shocking distortions by the IBT are the statements that "Air Canada's past election history showed the community of interest between fleet and passenger service employees", and "The Board was intimately familiar with those employees' duties *from three prior investigations on Air Canada's property.*" (IBT Br., p. 11). The record reference cited for those statements (A-262) shows nothing of the kind.[9]

6. The IBT's statement that "the court of appeals specifically pointed out . . . the NMB's experience with those very same categories gleaned from three prior NMB investigations among Air Canada's office, clerical, fleet and passenger service employees (IBT Br., p. 11) is made up out of whole cloth; the court of appeals decision says nothing about experience with Air Canada employees. (Pet., 3a; and see Pet., p. 13).

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commence investigation" on June 26, 1979 (A-375). On July 26, 1979, as the federal respondent acknowledges, the mediator concluded that the Teamsters had filed a proper representation application, and eight days later, without any investigation of the proper craft or class, the Board ordered an election among the alleged fleet service and passenger service employees (F.R. Br., pp. 3-4).

9 It shows that until 1977, the Board conducted three elections in the established craft or class of clerical, office, fleet and passenger service employees. There is not a word about any investigation, or any knowledge of the Board about job duties. The community of interest which the Board's decision in *National Airlines, Inc.*, R-1706, 1 N.M.B. 423 (1947), found to exist among the clerical, office, fleet and passenger service employees, was that they all shared a clerical character. When the Board determined in R-4847 that the Air Canada clerical and office employees no longer had a community of interest with fleet service and passenger service employees, it necessarily negatived any clerical community of interest as a determinant of whether fleet service and passenger service employees belonged together.

Conclusion

The petition for a writ of certiorari should be granted to answer the question left unresolved for almost 40 years: whether carriers, which are not parties to representation proceedings before the Board, must be helplessly obedient to Board certifications, even in a case in which it appears that the Board's actions had the result of assuring representation rights for a union applicant, in violation of the Railway Labor Act, by failing to investigate the facts which could lead to a proper craft or class determination, by defining as employees former employees who clearly would be union supporters and by arbitrarily excluding employees on the latter-day speculation that they might have been hired as union opponents.

Respectfully submitted,

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No. 81-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AIR CANADA,

Petitioner,

v.

NATIONAL MEDIATION BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ("IBT"); and LOCAL 732, IBT,

Respondents.

BRIEF OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE (AIRBORNE EXPRESS, INC., AIR CALIFORNIA, AIR FLORIDA, INC., AIR NEW ENGLAND, INC., ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., AMERICAN AIRLINES, INC., CONTINENTAL AIR LINES, INC., EASTERN AIR LINES, INC., THE FLYING TIGER LINE, INC., FRONTIER AIRLINES, INC., HAWAIIAN AIRLINES, INC., NORTHWEST AIRLINES, INC., OZARK AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, REEVE ALEUTIAN AIRWAYS, INC., REPUBLIC AIRLINES, TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIRLINES, INC., USAIR, INC., WESTERN AIRLINES, INC., AND WIEN AIR ALASKA, INC.) AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE INTEREST OF THE AMICUS CURIAE

Airline Industrial Relations Conference ("AIR Conference"), and its member air carriers,[1] are vitally con-

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[1] AIR Conference is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters, and to represent the member carriers with respect to legislative, judicial and administrative matters in those areas in the airline industry. Its members include: Airborne Express, Inc., Air California, Air Florida, Inc., Air New England,

cerned that whenever the National Mediation Board ("NMB" or "the Board") certifies a union with which a particular carrier will be statutorily obligated to "treat" (Railway Labor Act ["RLA"], Section 2, Ninth, 45 U.S.C. § 152, Ninth), such certification shall have been made in accordance with the statutory requirements. The record in this case, however, shows that the Board, after an election, not only certified a union to represent both "employees and former employees", but had not conducted an investigation to determine whether they constituted a craft or class, and included in the electorate persons who were not employees and excluded others who were. This case, moreover, is not an isolated example of the Board's questionable administration of its obligations under Section 2, Ninth of the Railway Labor Act.

Certification by the NMB of a union as representative of an air carrier's employees, where those employees were previously unrepresented, immediately restricts that carrier's freedom to establish rules, rates of pay, and working conditions. The processes of negotiation mandated by the Railway Labor Act may extend for a year or more; during that time, the carrier must maintain the status quo. (RLA, 45 U.S.C. § 156). In the highly competitive period initiated by the Airline Deregulation Act of 1978 (Pub.L. 95-504, 92 Stat. 1705), and in the difficult times created by the very recent illegal strike of the Professional Air Traffic Controllers Organization, if an air carrier's freedom to respond to those new challenges is to be restricted by Board action, it is more

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Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Airlines, Reeve Aleutian Airways, Inc., Republic Airlines, Texas International Airlines, Inc., Trans World Airlines, Inc., United Airlines, Inc., USAir, Inc., Western Airlines, Inc., and Wien Air Alaska, Inc.

than ordinarily important that any such restriction be imposed in full compliance with the statutory requirements.

REASONS FOR GRANTING THE WRIT

I. THE LOWER FEDERAL COURTS REQUIRE GUIDANCE ON THE REVIEWABILITY OF BOARD CERTIFICATIONS.

Heretofore, this Court has limited its guidance to the lower federal courts with respect to the proper administration of the Railway Labor Act by the National Mediation Board in representation matters to two decisions: the *Switchmen's Union* case (*Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297) in 1943 and the *Railway Clerks* case (*Brotherhood of Railway & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650) in 1965. Carriers must look to the courts to shield them against improper imposition of bargaining duties upon them by the NMB, since they are not parties to representation proceedings before the Board. Neither the *Switchmen's Union* nor the *Railway Clerks* case established any standard for post-certification review of Board compliance with the RLA, at the instance of the carrier to which the certification is addressed, although *Switchmen's Union* expressly left the question open, 320 U.S. at 307.

Yet, the court below questioned whether it had jurisdiction to set aside the Board certification which resulted from an election in which the eligibility date for employees was established at a date 13 months before the election, while, at the same time, 74 former employees, who were discharged two weeks before the representation application was even filed, were permitted to vote. (Petition, Appendix A, p. 3). The court, moreover, sustained the Board's craft or class determination in the admitted absence of any factual investigation, on the basis that the investigation required by the statute was supplied by the application of nonexistent Board "experience"

(*id.*), thus grossly distorting this Court's approval of the experience on which the Board justifiably relied in the *Railway Clerks* case. Only this Court can give guidance to the lower federal courts on their jurisdiction to see that a certification, which, under the statute, should express the desires of a "majority of any craft or class of employees" (RLA, § 2, Ninth), does not result from a process which excludes employees, includes non-employees, and imposes a grouping of job classifications included in the electorate without the necessary investigation to establish whether they are in fact a craft or class.

II. ARBITRARY DISENFRANCHISEMENT OF EMPLOYEES ENTITLED TO PARTICIPATE IN THE SELECTION OF A REPRESENTATIVE VIOLATES THE BOARD'S STATUTORY RESPONSIBILITY TO DETERMINE THE WISHES OF A MAJORITY OF EMPLOYEES AND THIS COURT SHOULD PROPERLY CONSTRUE THE STATUTE.

The petition raises the question whether the NMB properly determined who were "employees", under RLA Section 2, Ninth, when it made 49 passenger service employees (out of some 500) ineligible to vote because they became employees less than 13 months before the election. Neither the Board nor either of the courts below justified the eligibility cut-off date applied in this case as serving any reasonable statutory or administrative purpose. The district court, on the contrary, said only, "there is no clear statutory provision indicating that the Board may not under some circumstances impose a cut-off date which happens to be a year prior to the actual conduct of the election. . ." [2]

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[2] Petition, Appendix C, p. 18a. The court never specified the "some circumstances" which would justify so remote a cut-off date, nor did it find that those unspecified circumstances were present in this case. The Court of Appeals simply said that it agreed with the district court. (Petition, Appendix A, p. 3a).

The Board's arbitrary application of a cut-off date determined by the date of its representative's first visit to the carrier's property seems clearly contrary to the RLA's explicit command that "[T]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class", (RLA, Section 2, Fourth, 45 U.S.C. § 152, Fourth), and the statutory direct .e that representation disputes be expeditiously resolved by the Board.[3]

The Board evidently sees no limit to its discretion to disenfranchise employees by arbitrary imposition of even more extraordinarily remote eligibility cut-off dates. Subsequent to the *Air Canada* case, the Board set a cut-off date more than 2½ years before the election—disenfranchising close to 25 percent of the employees in the craft or class at the time of the election. *British Airways*, 7 NMB No. 237.[4] This Court should grant the writ to halt the imposition of bargaining duties on carriers in violation of the statutory mandate that only a majority of the employees, without arbitrary exclusion of large numbers of them, may select a representative.

III. THIS COURT SIMILARLY SHOULD CONSTRUE THE STATUTE TO PROHIBIT THE ENFRANCHISEMENT OF FORMER EMPLOYEES.

In determining that 74 former fleet service employees were eligible to vote, the Board and the courts below relied on a Board rule which purports to make improperly dismissed employees eligible to vote in a representation

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[3] RLA, Section 2, Ninth directs the Board to investigate a dispute and to certify the name of the designated and authorized representative "within thirty days after the receipt of the invocation of its services."

[4] A challenge to that action is presently pending in the Eastern District of New York. *British Airways Board* v. *NMB*, 81 Civ. 0174.

election,[5] merely because they had filed an action in district court alleging that they had been discharged for their activities in support of a union. The clear result of the Board's practice is to enable former employees to impose their representation desires—predictably pro-union *after* their discharge—on current employees, simply by an allegation of wrongful termination and regardless of any subsequent ruling that the termination was not improper.

The Railway Labor Act simply does not authorize the Board to permit former employees to vote, without a finding that they were discharged for union activity or for other improper reason, nor does it authorize the Board to certify a representative for employees and former employees. This Court should grant the writ and construe the statute to prevent enfranchisement of non-employees simply because they claim they were improperly discharged, to ensure that carriers are not compelled to bargain with a union not chosen as their representative by a majority of employees.

IV. THE INTEGRITY OF THE *RAILWAY CLERKS* CASE SHOULD BE RESTORED BY DECISION THAT THE BOARD'S DUTY TO INVESTIGATE CANNOT BE SATISFIED BY RELIANCE ON NONEXISTENT EXPERIENCE.

The immediate effect of the determination below is to uphold the Board's ruling that former fleet service and present passenger service employees of Air Canada constitute a single craft or class, although the Board concededly made *no* factual investigation to determine whether such employee classifications belonged in a single craft or class on that carrier. The predictable result of that determination in other cases, involving other carriers,

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[5] 29 CFR § 1206.6 (Petition, Appendix D, p. 24a).

will be to leave the Board free to find that any arbitrary combination of employees constitutes a craft or class, without factual investigation, without regard for its prior determinations, and without the restraining influence of judicial review.

The Court of Appeals condoned the failure by the Board to investigate the work relationships of alleged fleet service and passenger service employees by saying that the Board "had, and relied upon, extensive experience with each of the categories of employees as well as with the overall, traditional class or craft" (Petition, Appendix A, p. 3a). The question in this and in other cases in which the Board is urged by unions to find crafts or classes less inclusive than the "overall traditional class or craft" is not whether the Board may determine the existence of the overall grouping, on the basis of its past experience; this Court held in *Railway Clerks* that it may. Experience with "each of the categories of employees", however, has persuaded the Board only that their duties and relationships vary, with great diversity, on particular carriers, so that such experience gives no clue to what combinations of job classifications constitute a craft or class on a particular carrier such as Air Canada. *Continental Airlines*, NMB Case No. R-4448, at 12.

To justify the Board's failure to investigate by reliance on non-existent experience, as the Court of Appeals did, is to give the Board license to find crafts or classes where none exist, and to impose bargaining obligations on carriers to groups of employees not contemplated by the Railway Labor Act. This Court, therefore, should grant the writ to prevent nullification of the statutory requirement of an investigation to determine "untested" crafts or classes. *Railway Clerks*, 380 U.S. at 665.

CONCLUSION

The petition for a writ of certiorari should be granted, to answer unresolved important questions in the administration of the Railway Labor Act, and to insure integrity in that administration.

Respectfully submitted,

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